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No. 8—Consolidated With No. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.,
Appellants,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANTS CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL.

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OPINIONS BELOW

The opinion of the District Court (R. 1714-1734) is reported at 238 F. Supp. 528. The initial report of the Interstate Commerce Commission (R. 979-1049) and its supplemental report on reconsideration (R. 1056-1107) are reported at 321 I.C.C. 17 and 322 I.C.C. 491, respectively.

JURISDICTION

The judgment of the District Court was entered on February 18, 1965. (R. 1755-1756) Appellants filed a notice of appeal on March 25, 1965. (R. 1760-1764) On April 4, 1966, this Court noted probable jurisdiction and consolidated this appeal with the appeal of the United States and the Interstate Commerce Commission from the same judgment (No. 23). (383 U.S. 964; R. 1769) The jurisdiction of this Court rests on 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

Sections 1(4) and 15(6) of the Interstate Commerce Act (49 U.S.C. §§ 1(4) and 15(6)) and Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. §§ 1007(b) and 1009(e)) are set forth in Appendix A of this brief. The Administrative Procedure Act provisions are now codified as 5 U.S.C. §§ 557(b) and 706, respectively.

Section 15(6) of the Interstate Commerce Act, which implements a general duty imposed upon common carriers by railroad in Section 1(4) of the Act, provides in part as follows:

> "Whenever . . . the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential . . . the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. . . . In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

QUESTIONS PRESENTED

The District Court set aside orders entered by the Interstate Commerce Commission in proceedings held pursuant

to Section 15(6) of the Interstate Commerce Act. The orders found existing divisions of joint rates for the carriage of freight by rail between the eastern, midwestern and far western parts of the United States to be unjust, unreasonable and inequitable and prescribed new divisions which the Commission found would be just, reasonable and equitable for the future.[1] The case was tried and submitted by the parties and decided by the Commission as controversies among three contending groups of rail carriers—Eastern or Official Territory railroads, Midwestern railroads and Mountain-Pacific railroads.[2] Because of developments since the entry of the judgment below the questions now presented relate solely to the validity of the Commission's orders prescribing divisions between the Mountain-Pacific railroads, on the one hand, and Midwestern railroads, on the other.

The questions presented are:

1. Whether the District Court misconstrued Section 15(6) of the Interstate Commerce Act or otherwise erred

[1] A joint rate is one that extends over the lines of two or more carriers, and is established by the participating carriers either by agreement or pursuant to an order of the Commission. *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 139-140, note 2; *Chicago, M. St. P. & P. R. Co.* v. *United States*, 366 U.S. 745, 747, note 4; *Armour & Co.* v. *Atchison, T. & S. F. Ry. Co.*, 254 F.2d 719, 720, note 1 (C.A. 7th 1958). The joint rate paid by the shipper is divided among the participating carriers, and the "shares" of the rate received by them are known as "divisions." *St. Louis Southwestern Ry. Co.* v. *United States, supra*; *New England Divisions Case*, 261 U.S. 184, 187. The Commission has described divisions as "parts of rates." *New England Divisions*, 66 I.C.C. 196, 203 (1922).

[2] The terms "Eastern Territory" and "Official Territory" are used interchangeably. Since the Commission's reports generally refer to the territory as "Official Territory" and to the railroads operating therein as "Eastern lines," we shall follow the same course.

in holding that, in addition to the findings made as to the contending groups of railroads, the Commission was required to make findings as to each individual railroad in each group with respect to each factor specified in Section 15(6) of the Interstate Commerce Act, and was also required to find that the prescribed divisions would be just, reasonable and equitable "as to each individual carrier in each division."

2. Whether the District Court misconstrued Section 15(6) of the Interstate Commerce Act or otherwise erred in holding that the Commission was required to make, and failed to make, findings "in terms of dollars" of the amounts required by the carriers to pay their operating expenses, taxes, and a fair return on their carrier property, and that the findings made by the Commission were insufficient because they were stated in terms of annual rates of return.

3. Whether the District Court misconstrued Section 15(6) of the Interstate Commerce Act or otherwise erred in holding that the Commission was required to find the differences "in terms of dollars" between the revenues produced by the existing divisions it found unlawful and the revenues that might be produced by the divisions prescribed as lawful.

4. Whether any of the alleged errors of the Commission were prejudicial to any of the appellees.

5. Whether the District Court erred in setting aside the findings of the Commission that the present divisions were unjust, unreasonable and inequitable, and in remanding the cause to the Commission without retaining jurisdiction to require equitable resettlements of revenues received by the parties from Transcontinental freight rates in the event of a further decision or order of the Commission on remand.

STATEMENT

I. The Parties and the Nature of the Controversy

The appellants are eight Midwestern railroads.[3] This appeal is the latest stage in their efforts to obtain a more equitable division of the joint rates for the carriage of freight between points in Official (Eastern) and Midwestern Territories, on the one hand, and points in Transcontinental Territory, which lies in the far western part of the United States, on the other.[4]

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[3] Chicago and North Western Railway Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Green Bay and Western Railroad Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company and Soo Line Railroad Company. (R. 1760)

[4] These and other relevant rate territories are shown in the map which appears as Appendix B to this brief. The territories may be defined in general terms as follows:

(1) Official Territory is the section of the country east of Lake Michigan, Chicago and Peoria, Illinois, St. Louis, Missouri, and Cairo, Illinois, and north of the Ohio River and Norfolk, Virginia.

(2) Mountain-Pacific Territory lies west of a line from El Paso, Texas, through Albuquerque, New Mexico, Pueblo and Denver, Colorado, Cheyenne, Wyoming, and along the eastern boundaries of Wyoming and Montana.

(3) Transcontinental Territory, which is one of the two subdivisions of Mountain-Pacific Territory, lies west of El Paso, Texas, Albuquerque, New Mexico, Ogden, Utah, and the western border of Montana. The orders of the Commission also covered divisions of joint rates on traffic to and from points in Montana via the Twin Cities (Minneapolis and St. Paul, Minnesota) and other northern gateways, and for that limited purpose Montana was considered a part of Transcontinental Territory.

(4) Intermountain Territory, the other subdivision of Mountain-Pacific Territory, is that part of Mountain-Pacific Territory that lies east of Transcontinental Territory.

The present controversy has now been before the Interstate Commerce Commission and the courts for more than twelve years. Ten years were consumed by hearings and other administrative proceedings before the Commission.

In this controversy the principal opponents of the Midwestern railroads have been the 58 Mountain-Pacific railroads that are appellees here and that were plaintiffs or intervening plaintiffs in the court below.[5] They are joined in their attack on the validity of the Commission's orders by the State of California and its Public Utilities Commission; the Public Service Commissions of certain other western states; and two Midwestern railroads, the Missouri-Kansas-Texas Railroad Company (Katy) and the St. Louis-San Francisco Railway Company (Frisco), that are appellees here and were intervening plaintiffs in the court below.

The Mountain-Pacific appellees comprise substantially all of the rail carriers that serve Transcontinental Territory and the more inclusive Mountain-Pacific Territory,

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(5) Midwestern Territory comprises that section of the country between Official Territory and points on the Mississippi River south of Cairo, Illinois, on the one hand, and Mountain-Pacific Territory, on the other.

At points in its reports the Commission uses the term "western district" to indicate the entire area west of Official Territory, and the term "western lines" to indicate all of the railroads operating in that area.

[5] Thirty-four of the Mountain-Pacific lines are listed in Appendix A to their joint motion to affirm. The Southern Pacific Company, certain of its subsidiaries, and The Denver and Rio Grande Western Railroad Company filed a separate motion to affirm.

In its reports the Commission sometimes referred to the Mountain-Pacific lines as "the defendants" or "the transcontinental lines."

of which Transcontinental Territory is a part. They operate approximately 31,000 miles of road in Mountain-Pacific Territory. (Exhibit MW-608, R. 111, 494) They include a number of the largest and more prosperous railroads in the United States, notably The Atchison, Topeka and Santa Fe Railway Company, the Union Pacific Railroad Company, the Southern Pacific Company, the Northern Pacific Railway Company and the Great Northern Railway Company, which operate approximately 26,000 miles of road in Mountain-Pacific Territory. (Exhibit MW-608, R. 111, 494) In addition to their operations in Mountain-Pacific Territory, these five major Mountain-Pacific lines, directly or through subsidiary companies, also operate nearly 35,000 miles of road in Midwestern Territory as compared with the 39,000 miles operated by the eight Midwestern appellants. (Exhibit MW-608, R. 111, 493-495)[6]

The controversy between the Mountain-Pacific and Midwestern railroads relates primarily to divisions and subdivisions of joint rates between the two groups of carriers on two categories of traffic moving to or from Transcontinental Territory. One category embraces traffic that originates or terminates in Midwestern Territory. The other category embraces traffic that originates or terminates in Official Territory and moves through Midwestern Territory en route to or from Transcontinental Territory. The traffic

[6] These five lines operate directly approximately 24,000 miles of road in Midwestern Territory. In addition, two of them, the Great Northern and Northern Pacific, control the Chicago, Burlington & Quincy System, which operates 9,240 miles in Midwestern Territory; and one of them, the Southern Pacific, through its subsidiary, the St. Louis Southwestern Railway Company, operates 1,550 miles in Midwestern Territory. (Exhibit MW-608, R. 111, 494-495)

in both categories moves through Intermountain Territory en route to or from Transcontinental Territory.[7]

The proceedings before the Commission also involved a controversy over the primary divisions of joint rates on traffic between Official and Transcontinental Territories. The rail carriers in Official Territory (Eastern lines) as well as the Midwestern and Mountain-Pacific lines were parties to this controversy. These primary divisions break at Chicago, Peoria, St. Louis and other Eastern gateways and divide the joint rates between the group of railroads that operates east of those gateways in Official Territory, on the one hand, and the railroads (including both the Mountain-Pacific and Midwestern carriers) that operate west of those gateways, on the other hand.[8]

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[7] For this reason the divisions prescribed by the Commission cover services performed by the Mountain-Pacific lines in moving traffic through Intermountain Territory on its way from or to points in Transcontinental Territory. The Commission did not, however, prescribe divisions of joint rates on traffic that moves to or from points in Intermountain Territory except with respect to certain traffic to or from points in Montana via the Twin Cities and other northern gateways. (See note 4(3), page 5, *supra*.) Nor did the Commission prescribe divisions of joint rates between the Mountain-Pacific lines on shipments interchanged between those lines in Midwestern Territory or subdivisions as between the Mountain-Pacific lines for services performed in Mountain-Pacific Territory.

[8] In its reports the Commission sometimes used the term "interterritorial" to describe these primary divisions of joint rates between the carriers east and west of Chicago and other Eastern gateways, and the word "intraterritorial" to describe the divisions of joint rates between the Midwestern and the Mountain-Pacific lines. (See for example, R. 1034, 1038.) For the purpose of this terminology the Commission regarded all of the area west of Chicago as a single territory (Western Territory).

There has been no substantial change in the divisions of the Midwestern lines on Transcontinental traffic since 1925 although, as the Commission found, those divisions "have long been a source of dissatisfaction to the midwestern lines." (R. 989-990) In 1925 the Midwestern and Mountain-Pacific lines agreed upon certain increases in divisions that had been in effect for many years.[9] This agreement was made after the Commission on its own initiative had instituted an investigation of the lawfulness of the Midwestern-Transcontinental divisions and had begun hearings on their reasonableness but before the submission of the case to the Commission for determination.[10]

[9] Prior to 1925 the rates were divided on a basis that had been substantially unchanged since the 1870's. (R. 988) As between the Midwestern and the Mountain-Pacific lines, these historic divisions were based upon mileage prorates in which the factors for the hauls of the Mountain-Pacific lines in both Midwestern and Mountain-Pacific Territories were based upon constructive distances that were 150 percent of the actual distances. (R. 988) On this basis, the involved revenues accruing to all lines west of Chicago divided 15 percent to Midwestern lines for their haul between Chicago and Missouri River cities (principally Council Bluffs and Kansas City) and between Chicago and the Twin Cities (Minneapolis and St. Paul), and 85 percent to the Mountain-Pacific lines for their services west of those points. The corresponding divisions of the involved revenues west of St. Louis via the Missouri River Crossings were 11 percent and 89 percent, respectively. The 1925 agreement slightly ameliorated the inequality inherent in the divisions which had been in effect since the 1870's by increasing the percentage points for the Midwestern lines by a tenth, *i.e.*, 16.5 instead of 15 percent and 12.1 instead of 11 percent, with a corresponding slight reduction in the percentage points accruing to the Mountain-Pacific carriers. (R. 990).

[10] In 1929 the Commission reopened that proceeding and took evidence on the divisions between the Midwestern and the Mountain-Pacific lines. A decision in the reopened hearings was handed down in 1934 in which the Commission held that on the evidence

Except for these increases there has been no significant change in the structure of the Midwestern-Transcontinental divisions since it was first established nearly one hundred years ago. (R. 988-991)

In their efforts to obtain a readjustment of their divisions by agreement with the Mountain-Pacific lines, the Midwestern lines have been handicapped by limitations on their bargaining power imposed by a number of circumstances. For one thing, the divisions of the Midwestern lines are affected by the arrangements made between the Mountain-Pacific lines and the Eastern lines with respect to divisions on Official-Transcontinental traffic, and the Midwestern lines had no control over, and no voice in, these arrangements. For another, the bargaining position of the Mountain-Pacific lines was enhanced by the vast extent of their operations and the volume of traffic they controlled, and also by the fact that several of the larger and more powerful Mountain-Pacific systems operated in Midwestern Territory and to that extent were not dependent upon connections with the Midwestern carriers. Historically the Midwestern carriers found it difficult to adopt and to maintain a unified front on the question of divisions to the same degree that the Mountain-Pacific carriers were able to do.

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of record it was "unable to find that the divisions of the transcontinental rates are unlawful." (R. 990) In its initial report in the present case the Commission declined to determine whether that finding was an affirmative approval of the divisions then existing, saying: "The question of interpretation is of little moment, however, in view of changes which have occurred in the intervening years." (R. 1034)

In 1940 the Commission again reopened the proceeding for the purpose of considering the divisions between the Midwestern and the Mountain-Pacific lines, but thereafter discontinued it because of conditions created by the World War. (R. 990)

These circumstances are reflected in the record. The Commission in this proceeding noted in its initial report "that never before in the litigation relating to the divisions east of the Missouri River gateways have the midwestern lines apparently felt free to join in a united effort to obtain higher divisions for their service in this territory." (R. 1034) The record discloses that in the past the President of one Midwestern carrier wrote in reply to an inquiry from a member of the Interstate Commerce Commission that the traffic position and influence of the Mountain-Pacific lines made it difficult for the Midwestern carriers to act together to obtain relief with respect to their divisions. (Exhibit MW-452, pages 3-4, Appendices A and B) In the present controversy, the Midwestern lines attempted to negotiate with the Mountain-Pacific lines before resorting to the Commission, but the Mountain-Pacific lines refused even to discuss the divisions of the Midwestern lines until their dispute with the Eastern lines over the primary divisions on Official-Transcontinental traffic had been settled. (Exhibit MW-197, pages 8-10, Appendices A-I) Upon this refusal to negotiate, the Midwestern lines sought relief from the Commission. Subsequent to the decision of the court below the Eastern and Mountain-Pacific railroads negotiated a settlement of the divisions on Official-Transcontinental traffic without any consultation with the appellant Midwestern lines. Shortly thereafter the Mountain-Pacific railroads also made an agreement on divisions with their subsidiaries and associated lines in the Midwest. (See pages 28-30, *infra*.)

II. The Proceedings Before the Commission

The administrative proceedings were initiated by complaints filed with the Interstate Commerce Commission, invoking its power under Section 15(6) of the Interstate

Commerce Act to determine the lawfulness of existing divisions and to prescribe lawful divisions in lieu of any found unlawful. Two principal complaints were filed—one by the Eastern lines in April 1954, which related to the primary divisions on Official-Transcontinental traffic, and the other by a group of Midwestern lines in June 1954, which related to both Official-Transcontinental and Midwestern-Transcontinental traffic.[11] (R. 1-25, 981-982) Cross-complaints were filed by the Mountain-Pacific lines. (R. 25-29, 982) Considered collectively, the complaints and cross-complaints brought in issue the lawfulness of the existing divisions on Official-Transcontinental and Midwestern-Transcontinental traffic. The parties to the proceedings before the Commission included substantially all of the railroads in Official and Western Territories. (R. 5-16, 980-982)

The actively participating carriers elected to align themselves into three major contending groups—Eastern, Midwestern and Mountain-Pacific—and the administrative proceedings were tried, heard and submitted as controversies between these three major contending groups of

[11] The Commission described the complaint of the Midwestern lines "as one of the two major components of this litigation." (R. 982)

Complaints were also filed by the Burlington System and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. (R. 31-46, 982) These complaints were similar to that of the Midwestern lines. The Milwaukee Road is now one of the appellants herein. (See note 3, page 5, *supra.*)

Complaints were also filed by the Louisville and Nashville Railroad Company and the Southern Railway Company and one of its subsidiaries. These carriers have lines of railroad in a portion of Official Territory, and their complaints were similar to that of the Eastern lines. (R. 982)

carriers. (R. 489-490, 980, 981, 1057-1058, 1084, 1715) Sixteen hearings, aggregating 76 days, were held over a period of five years. The direct testimony was principally in the form of exhibits, of which there were 834. The transcript, comprising 11,242 pages, was made up principally of oral testimony on cross-examination. (R. 981) The record was notable for the comprehensive character of the evidence it contained with respect to the traffic, the divisions and the carriers involved. The Mountain-Pacific lines described the record as "large," "exhaustive" and "ample." (R. 793, 815) The Midwestern group, which at that time included appellees Katy and Frisco, advised the Commission that the record was "without doubt more comprehensive and informative than any record which the Commission has heretofore had before it in any interterritorial divisions case." (R. 879) The parties in their arguments to the Examiners and the Commission analyzed the evidence in detail. The initial briefs filed by the three groups of carriers with the Examiners, in June 1960, covered 1,145 pages plus voluminous appendices. (R. 981)

After a recommended report by the Hearing Examiners and the filing of exceptions and replies thereto, the Commission heard oral argument on June 20, 1961. (R. 980) On March 21, 1963, the Commission issued its initial report and order to be effective July 1, 1963.[12] (R. 979-1052) The conclusions of the Commission in its initial report differed from those recommended by the Hearing Examiners. In general the divisions prescribed by the Commission for the Eastern lines on Official-Transcontinental traffic were substantially higher than those recommended by the Examiners. The divisions prescribed for Midwestern lines on

[12] On June 20, 1963, the Commission entered an order correcting several inadvertent omissions in the initial report and order. (R. 1053-1055)

Midwestern-Transcontinental and Official-Transcontinental traffic were less in some instances and greater in others than those which the Examiners recommended. Thereafter petitions for reconsideration were filed by the three groups of carriers involved and by certain of the other parties to the proceeding, and on December 31, 1963, the Commission issued its supplemental report and order addressed to these petitions.[13] The supplemental report and order, which were issued to be effective on March 30, 1964, confirmed, with relatively minor modifications, the divisions prescribed in the initial report and order and the effective date thereof. (R. 1056-1111)

III. The Findings of the Commission

A. Findings on the Traffic and Divisions Involved

In its initial report the Commission made findings on the nature of the traffic and divisions involved. These findings covered all the traffic involved and related to such matters as the volume and composition of the traffic, the revenue from the traffic, routes and interchange points, and the average hauls of the three groups of carriers involved. (R. 983-987) The Commission also made findings on the history, structure and level of the existing divisions. (R. 988-991) With respect to the existing divisions on Midwestern-Transcontinental traffic the Commission found, among other things, that a traffic study of the Mountain-Pacific lines showed that under those divisions the Midwestern lines received 25.9 percent of the revenue ($160,285,000) for an average haul of 620 miles, while the Mountain-Pacific lines received 74.1 percent of the revenue ($470,329,000) for an average haul of 1,488 miles. (R. 986-987) Thus, although

[13] Several errors of a clerical nature in the supplemental report were corrected by a notice to the parties dated February 4, 1964. (R. 1112-1113)

the Midwestern lines performed 29.4 percent of the service, they received only 25.9 percent of the revenue, while the Mountain-Pacific lines received 74.1 percent of the revenue for performing 70.6 percent of the service.[14]

B. Findings on Relative Cost of Service

A large part of the record before the Commission related to the relative cost of service. Each of the three groups of railroads presented studies to show on a group basis the cost of handling the traffic involved. (R. 992) Each study represented an analysis of the costs of handling a sample of the traffic involved which its proponent asserted would produce results valid for the whole traffic. A substantial part of the two reports of the Commission was devoted to a discussion of contentions attacking and defending these studies. (R. 991-1015, 1058-1066) The Commission made findings on the relative cost of service performed by each of the three groups of carriers, using for this purpose the cost study of the Mountain-Pacific lines with certain adjustments that the Commission found were justified by the evidence. (R. 1008-1009) These findings showed in dollar amounts for each group of railroads the costs incurred in performing the transportation service involved and the amount of revenue from the service under the existing divisions. The findings also showed for each group of railroads the percentage relationship between the cost and the revenue. (R. 1009) The costs stated in these findings reflected operating expenses, taxes, and a 4 percent return on railroad property associated directly with the traffic involved. (R. 1007-1008)

[14] The average hauls of the two groups add up to 2,108 miles, and the percentages of 29.4 and 70.6 are the relation of the average hauls (i.e., ton-miles of service) of the two groups of carriers to the total average haul. The Midwestern lines' revenues would have to be increased 13 percent to bring such revenues up to their mileage proportion of the through service.

On the basis of these cost findings the Commission found that under the existing divisions the Mountain-Pacific lines' share of the revenue from the Midwestern-Transcontinental traffic exceeded their out-of-pocket costs by 71 percent while the Midwestern lines' share of the revenue exceeded their out-of-pocket costs by only 39 percent. It further found that on the Official-Transcontinental traffic the revenue of the Mountain-Pacific lines under the existing divisions exceeded their out-of-pocket costs by 57 percent while the revenue of the Midwestern lines exceeded their out-of-pocket costs by only 43 percent. (R. 1012)[15]

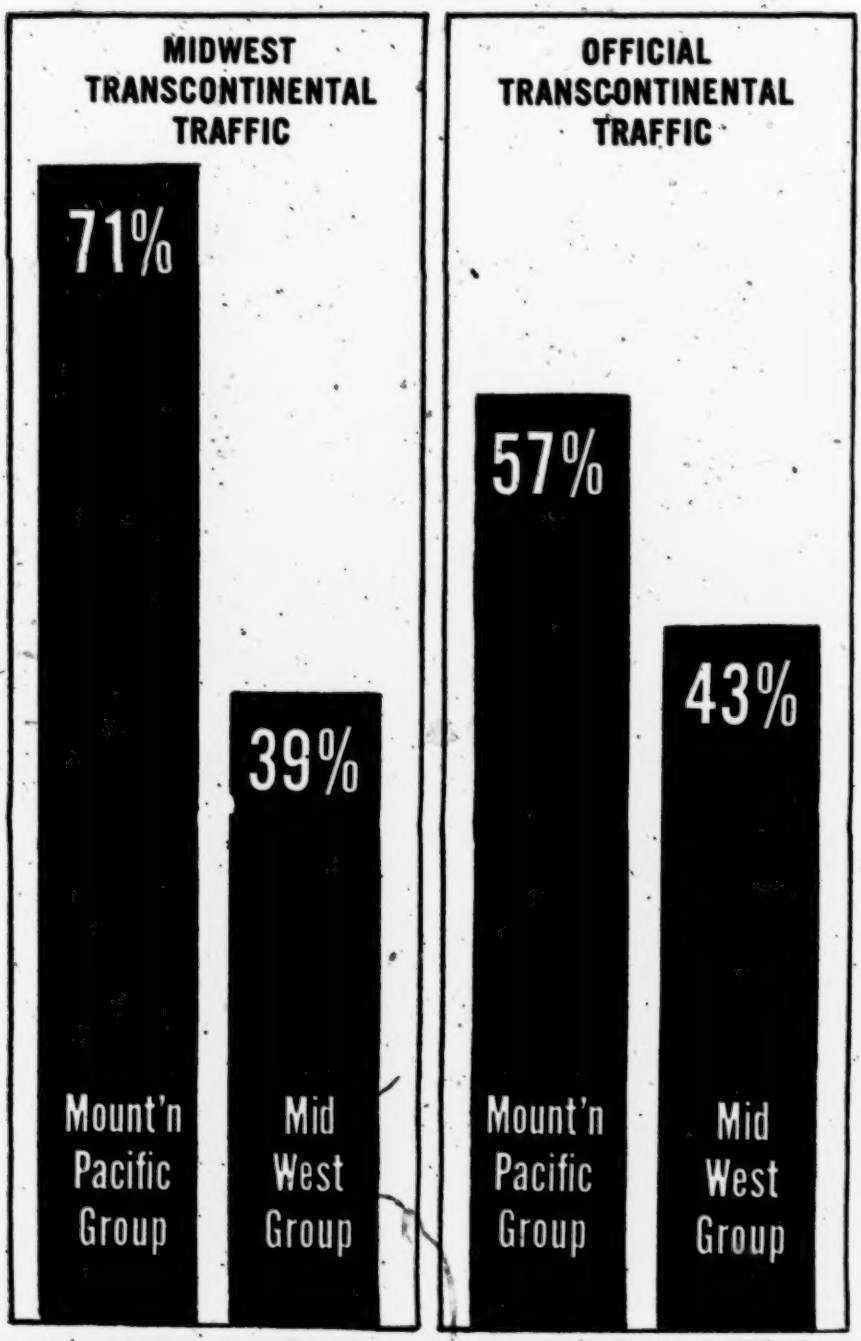
The substantial discrepancy between the revenues of the Mountain-Pacific lines and those of the Midwestern lines and their relative contributions to the cost of the service involved is shown in the chart that appears on the opposite page. This substantial discrepancy was the basis of the action that the Commission took in this case with respect to the Midwestern divisions. (See pages 45-50, *infra*.)

C. Findings on Revenue Needs

The Commission also considered whether any of the three contending groups of carriers, because of its general financial needs and the public importance of the transpor-

[15] The Commission also found that on the Midwestern-Transcontinental traffic, the Mountain-Pacific lines received 4.4 percentage points more of the total revenue, and the Midwestern lines 4.4 percentage points less, than they would respectively receive if the revenues were divided in proportion to the aggregate costs incurred by each group in handling the traffic. It further found that on the Official-Transcontinental traffic, the existing divisions gave the Mountain-Pacific lines from 4.6 to 5.8 percentage points more of the total revenue from the traffic than they would receive if the revenue were divided in proportion to the aggregate cost of the group of carriers involved in handling it, and the Midwestern lines received from 0.3 to 0.9 percentage points less than their share of the cost of furnishing the service. (R. 1012)

Amounts by which Revenues from Present Bivisions Exceed Costs of Handling Transcontinental Traffic



tation service that it supplied, was entitled to a larger amount of revenue from the traffic involved than might be justified merely on the basis of the relative cost of performing the service.

A substantial part of the Commission's reports was devoted to consideration of the evidence and arguments on this issue of "revenue needs." (R. 1015-1029, 1032-1034, 1066-1075) In its initial report the Commission made findings on the carriers' net railway operating income from all services—both freight and passenger—for the period 1946-1958. (R. 1017) It then proceeded to consider the rates of return represented by such earnings. In this connection it was necessary for the Commission to resolve certain disputed issues relating to the proper method of determining rates of return. One of these issues was whether in making this determination net railway operating income should be related to book value (original book cost less accrued depreciation and amortization) or to the valuations of railroad property made by the Commission's Bureau of Valuation as required by Section 19a of the Interstate Commerce Act (49 U.S.C. § 19a), which are commonly referred to as the "elements of value." (R. 1018-1020)[16] The Commission rejected the contention of the Mountain-Pacific lines that rate of return should be determined on book value, saying that "controlling weight should be given the showing based on elements of value." (R. 1020)

Accordingly, the Commission made findings on the average rate of return for the railroads in each of the three

[16] Other issues relating to rates of return considered by the Commission included the question of the periods of time for which rates of return should be compared (R. 1017-1018), the question whether rates of return should be adjusted to avoid distortions because of the incidence of the Federal income tax, and the question whether an "acquisition adjustment" should be reflected in the investment base. (R. 1021-1022)

groups for the period 1946-1958 on the basis of the elements of value. It found that the average return of the Eastern railroads in the period 1946-1958 based on net railway operating income from all services and related to the elements of value investment base was 3.40 percent as compared with 3.49 percent for the Midwestern group and 4.64 percent for the Mountain-Pacific lines. (R. 1027)[17]

In addition to rates of return, the Commission also considered other matters bearing on the revenue needs of the three groups of carriers, as, for example, the volume of freight traffic, changes in that volume, the net railway operating income from all services, and the freight revenues and passenger deficits for each of the groups of carriers involved. (R. 1016-1017, 1022-1024, 1027)

Based on its consideration of all of the evidence, the Commission made findings as to the revenue needs of the three groups of carriers. (R. 1027-1029, 1032-1034) In these findings it drew a clear distinction between the Eastern railroads, on the one hand, and the railroads operating west of the Eastern gateways such as Chicago and St. Louis (including both the Mountain-Pacific and the Midwestern railroads), on the other. The Commission found "that the eastern railroads are in a less advantageous situation as freight carriers than those in the western district." (R. 1027) The Commission dealt specifically with the contention of the Midwestern lines that their revenue needs were "greater than those of the opposing eastern and transcontinental roads." (R. 1027-1029) It found (R. 1029):

[17] The Commission also made findings on relative rates of return based on book investment. On that basis it found that for the same period 1946-1958 the net return of the Eastern lines was 3.26 percent, for the Midwestern lines 3.34 percent and for the Mountain-Pacific lines 3.89 percent. (R. 1027)

> ". . . that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period and that their prospects for sustained or increased freight income are less promising than those of the defendant transcontinental railroads. At the same time, as a group, they are shown to be in a considerably more favorable condition than the eastern railroads."

The Commission noted that this finding in effect rejected the contention of the Midwestern lines that their divisions should be substantially increased for the purpose of meeting their alleged revenue needs. (R. 1029)

The Commission considered and rejected the contention of the Mountain-Pacific lines that the public interest warranted an increase in their divisions in order to provide a source of investment funds required for enlarged facilities. On this point, the Commission found (R. 1033):

> "The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

D. The Commission's Basic Findings on the Factors Set Forth in Section 15(6) of the Interstate Commerce Act

On the basis of the evidentiary and intermediate findings that have been discussed above the Commission in the concluding section of its initial report and in its supplemental report made basic findings on the factors that it is required to consider by the provisions of Section 15(6) of the Interstate Commerce Act. In its supplemental report, the Commission emphasized that it had considered the evidence relating to "all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including the

beneficial and alleged detrimental aspects of the prescribed divisions." (R. 1068)

The Commission made findings on the factors of efficiency and public importance. (R. 1030-1032) It found "that none of the contending groups is more or less efficiently operated than another" (R. 1030), and "there are no differences in the importance to the public attributable to the three contending groups of carriers." (R. 1032)

The Commission then turned to the factor of "the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property," including in its consideration both the relationship of costs (including return) to revenues on the traffic involved and the alleged general revenue needs of the contending groups of carriers. (R. 1032-1034)[18]

The Commission discharged its obligation to make findings on the illegality of existing divisions as a condition precedent to the prescription of new divisions. It found (R. 1032):

> "From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the defendants [Mountain-Pacific lines] to an extent not justified by ascertainable cost differences."

The Commission then observed that the cost evidence "does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need." (R. 1032) This observation foreshadowed the findings that the Commission made with respect to the divisions on Official-Transcontinental traffic.

[18] The findings with respect to the relative cost of service of the contending groups of carriers reflected their services as originating, intermediate or delivering lines, which is a factor specified in Section 15(6).

After adverting to certain changes in economic conditions affecting the Eastern lines, the Commission made the following finding as to its reasons for deciding that the divisions of those lines on Official-Transcontinental traffic should be increased (R. 1033):

> "Under the requirement of the public interest that all essential parts of the transportation system be maintained, so far as possible, in effective working condition (*New England Divisions, supra*), we believe that there should be increases in the complainants' [Eastern lines'] divisions reflecting revenue need as well as cost."[19]

In the very next sentence the Commission made it plain that the increases it was ordering in the Midwestern divisions on the traffic involved were based on relative cost of service and not on revenue needs. The Commission found (R. 1034):

> "As between the defendants [Mountain-Pacific lines] and the other western railroads [Midwestern lines] the differences in earning power are less marked, but our consideration of the evidence bearing on cost of service previously discussed convinces us that the primary midwestern divisions as a whole are too low."

In its supplemental report the Commission again made this distinction between its grounds for ordering an increase in the divisions of the Eastern lines and its grounds for ordering an increase in the divisions of the Midwestern lines. The Midwestern lines in their petition for reconsideration had contended that the increased divisions prescribed by the Commission did not give proper recognition

[19] The Commission reiterated the point later in its report, saying that the prescribed Eastern divisions "are higher than the present percentages in recognition of the evidence relating to cost and revenue need previously discussed herein." (R. 1035)

to their revenue needs. (R. 1084-1085) The Commission rejected this contention, stating (R. 1086):

> "It was our stated view that such increases were supported by the evidence concerning cost of service, but that the proposal of the midwestern lines gave undue weight to their claimed revenue need."

In contrast, the Commission in its discussion of the increased divisions of the Eastern lines reiterated that those divisions had been prescribed on the basis of both relative costs and revenue needs. (R. 1077) It specifically found that the increased divisions were justified "from the standpoint of both cost and revenue needs" (R. 1078) and "are necessary, in the public interest, to maintain all essential parts of the transportation system in effective working condition." (R. 1078)

IV. The Divisions Prescribed by the Commission

The Commission prescribed new divisions applicable to both the Official-Transcontinental traffic and Midwestern-Transcontinental traffic which it found would be just, reasonable and equitable. (R. 1040, 1093)

It prescribed divisions for application on traffic between Official Territory and Transcontinental Territory in the form of specific percentages of the joint rates. The Commission set forth these percentages in Appendix B-1 to its supplemental report. (R. 1094-1101) These percentages provide for a two-way primary division of the joint rates on Official-Transcontinental traffic over Chicago, Peoria, St. Louis and other gateways between the Eastern and Western railroads. The Eastern primary divisions relate to the service of the Eastern lines east of those gateways, and the Western primary divisions relate to the service of the Western lines (both Midwestern and Mountain-Pacific lines) west of those gateways. The Midwestern lines are involved

in the primary divisions east of the Eastern gateways only from and to certain points in Southeastern Illinois.[20]

The Commission used a different mechanism for prescribing divisions between the Midwestern and Mountain-Pacific carriers for application within the territory west of Chicago, St. Louis and other Eastern gateways on traffic moving to or from Transcontinental Territory. For this purpose the Commission used scales of prorating factors, finding that "divisional scales afford an appropriate means of readjusting the intraterritorial divisions, and [that] the possibility of such use was discussed extensively in the record." (R. 1038) These scales consist of integers, arranged by mileage blocks, that are used to construct percentages that in turn are used to divide the joint rates.[21] The divisional factors prescribed for hauls in Mountain-Pacific Territory were 10 percent higher than those pre-

[20] Five of the Midwestern appellants have lines in that part of Official Territory known as Group E-5, Southeastern Illinois, which is the area south and east of Chicago, Peoria and East St. Louis, and includes Evansville, Vincennes and Terre Haute, Indiana; and for this limited purpose the Commission considered the Midwestern lines as Eastern lines. (R. 1036)

[21] Scales of prorating factors are also referred to as scales of divisional factors or simply as divisional scales. They are a convenient means by which percentages are determined for use in dividing the freight revenue produced by joint rates. The mechanics by which the scales are employed to produce percentages may be illustrated by a shipment moving 1,000 miles in Midwestern Territory to Pueblo, Colorado, and thence 1,000 miles in Mountain-Pacific Territory. The factor prescribed for the 1,000-mile haul in Midwestern Territory is 294; and the factor prescribed for a like haul in Mountain-Pacific Territory is 323. (R. 1101, Cols. 1 and 3) The total factors (integers) are thus 617; and the carriers in Midwestern Territory would receive 294/617, or 48 percent, of the rate, and the carriers in Mountain-Pacific Territory 323/617, or 52 percent, of the rate.

scribed for corresponding hauls in Midwestern Territory. (R. 1039, 1079) These scales of divisional factors are set forth in Appendix C-1 to the Commission's supplemental report. (R. 1101-1105)

The divisional scales thus prescribed for Midwestern and Mountain-Pacific lines in Appendix C-1 are used to determine percentages by which to calculate (1) the divisions of joint rates for service east and west of the border of Mountain-Pacific Territory on (a) traffic originating in Midwestern Territory and terminating in Transcontinental Territory or vice versa and (b) traffic between Official Territory and Transcontinental Territory moving through Midwestern Territory; and (2) the subdivisions of the divisions east of the border of Mountain-Pacific Territory as determined on either of the foregoing types of traffic to be applied when shipments are interchanged between Midwestern and Mountain-Pacific lines in Midwestern Territory. (R. 1103-1104)

Examples of the application and operation of these divisional scales are set forth in Appendix C to this brief.

The scales of prorating factors prescribed by the Commission in Appendix C-1 were modeled on a scale that the Commission had prescribed for application in dividing joint rates on traffic between Official and Southwestern Territories in *Official-Southwestern Divisions,* 287 I.C.C. 553 (1953).[22] The basic scale there prescribed was referred to by the Commission and the parties as "the 29886 scale" (by reference to the docket number of the *Official-Southwestern*

[22] The scales prescribed in Appendix C-1 were identical to the scales prescribed in the cited case except that, as noted above, the factors prescribed for application to the hauls of the Mountain-Pacific lines in Mountain-Pacific Territory were 10 percent higher than the factors prescribed for application to hauls in Midwestern Territory. (R. 1039)

case). (R. 1039, 1079) The record before the Commission contained evidence relating to the possible application of the 29886 scale to the divisions here in issue. (R. 1039, 1085-1086) The scales prescribed by the Commission also resemble, in certain respects, similar scales that the Commission prescribed for application in making divisions on traffic moving to and from certain border points between Official and Southern Territories in *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960). The Commission's order in that case was upheld in *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26.

The Commission found in both its initial and supplemental reports that the scales of prorating factors prescribed in Appendix C-1 would produce "moderate increases in some of the most important midwestern divisions." (R. 1039, 1086)[23]

V. The Proceedings in the Court Below

The present action was begun on June 25, 1963, by a complaint filed in the United States District Court for the Southern District of California by 11 Mountain-Pacific lines seeking to enjoin and to set aside the Commission's initial order of March 21, 1963. (R. 1114, 1715)[24] The Eastern lines and certain Midwestern lines, including these appel-

[23] At the time of its supplemental report the Commission had before it tables prepared by the Midwestern lines from the record and included in their petition for reconsideration, which compared the divisions prescribed by the Commission with the existing divisions. The Commission adverted to these tables in its finding. (R. 1086)

[24] Forty-five additional Mountain-Pacific lines, the State of California, the regulatory agencies of ten other Western states, and the Frisco and Katy intervened as plaintiffs. (R. 1137, 1144, 1170, 1173-1174, 1282-1283, 1529, 1715)

lants, intervened as defendants. (R. 1151, 1163-1164, 1530, 1715) A three-judge court was convened and on August 3, 1963, that court entered an interlocutory injunction restraining enforcement of the Commission's order until after a hearing by the Commission on the petitions for reconsideration. (R. 1142-1143, 1196-1200) On March 23, 1964, after the Commission in its supplemental report of December 31, 1963, had denied the petitions for reconsideration, the court entered an interlocutory injunction, on the supplemental and amended complaints which had previously been filed, enjoining the enforcement of the Commission's order of December 31, 1963, until a final determination on the merits.[25] (R. 1259-1264)

The District Court handed down an opinion dated January 25, 1965. (R. 1714-1734) The court held that the Commission's findings and conclusions were insufficient (1) because the Commission had failed to make affirmative findings which disclosed that the factors specified in Section 15(6) had been considered not only as to the groups of railroads involved but also with respect to each individual carrier involved; and (2) specifically because the Commission had failed to make findings in dollar amounts (a) as to the revenue needs of each group of carriers and of each individual carrier involved and (b) as to the difference between the revenues produced by the existing divisions and those that would be produced by the prescribed divi-

[25] Considered together the interlocutory orders (which are still in effect) provide that if the orders of the Commission are not permanently enjoined, set aside, annulled or suspended upon final determination of the action, they shall be deemed to be effective for all purposes as of and from their respective effective dates (July 1, 1963, and March 30, 1964) and that appropriate indemnification must be made by the Mountain-Pacific lines on specified terms. (R. 1196-1200, 1260-1263)

sions for each group of carriers and for each individual carrier involved.[26]

On February 18, 1965, the District Court entered a judgment setting aside the orders and remanding the case to the Commission for further proceedings consistent with the court's opinion. (R. 1755-1756) The suggestion of these appellants that the judgment should contain a provision whereby the court would retain jurisdiction to require equitable resettlements of divisions in the event of a further decision or order of the Commission upon remand was not adopted. (R. 1736, 1739-1744)

By a simultaneous order, the District Court directed that the effectiveness of its judgment should be stayed for a period of sixty days, and if a notice or notices of appeal to the Supreme Court were filed within that period, the stay should continue until the final disposition or termination of such appeal or appeals. (R. 1759) Appeals were filed by the Eastern lines, by these appellants, and by the United States and the Commission within the sixty-day period. (R. 1760-1768)

VI. The Subsequent Settlement Agreements and Their Effect on the Issues

After the filing of jurisdictional statements in the three appeals referred to above, there were negotiations among certain of the carriers involved that led to a settlement of the controversy over the divisions on Official-Transcontinental traffic between the Eastern lines, on the one hand,

[26] The Mountain-Pacific lines contend that the District Court also held the findings deficient on the ground that the Commission had not considered the revenue needs of the carriers for all transportation services including needs represented by passenger deficits. For the reasons stated at note 54, pages 61-62, *infra*, appellants submit that the court below did not hold the findings deficient on this ground.

and the Mountain-Pacific lines and some of the Midwestern lines, on the other. A settlement was also made between the Mountain-Pacific lines and certain of the Midwestern lines with respect to divisions on Midwestern-Transcontinental traffic. The Midwestern lines which entered into the settlements include two which are members of Mountain-Pacific railroad systems,[27] one which is under contract of merger with a Mountain-Pacific line,[28] two which joined with the Mountain-Pacific lines in attacking the orders of the Commission in the District Court,[29] and one which has lines in Official and Mountain-Pacific Territories as well as in the Midwest.[30]

The settlement agreements did not affect the interests of these appellants as Midwestern lines or with respect to their operations in a small part of Official Territory. (See pages 23-24 and note 20, *supra*) Furthermore, 45 short-line connections of these appellants in Midwestern Territory, who would receive increased divisions under the orders of the Commission, were not parties to the settlements.

[27] Chicago, Burlington & Quincy Railroad Company, whose stock is owned by the Great Northern Railway Company and Northern Pacific Railway Company, and the St. Louis Southwestern Railway Company, which is a part of the Southern Pacific System. (Exhibit MW-608, R. 111, 495, 499-500, 502)

[28] Chicago, Rock Island and Pacific Railroad Company, which has a contract of merger with the Union Pacific Railroad Company subject to the approval of the Commission.

[29] Frisco and Katy.

[30] The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which is one of these appellants. This carrier joined in the settlements as to its interest as a Mountain-Pacific carrier and its interest in Official Territory, except Group E-5, Southeastern Illinois, but not as to its greater interest as a Midwestern carrier and carrier in Group E-5.

Upon petitions of the parties to the settlement agreements the Commission vacated its orders to the extent necessary to permit the settlements to be made effective; but the orders were not vacated insofar as they prescribed divisions for the services of these eight appellants and their 45 short-line connections in Midwestern Territory and Southeastern Illinois.

The partial vacation of the Commission's orders rendered moot the appeal of the Eastern lines, and also rendered moot in part the appeal of the United States and the Commission. This Court made appropriate disposition of these appeals in the light of suggestions of mootness. 383 U.S. 832; 384 U.S. 888. There remains in controversy, however, between the Mountain-Pacific lines and the Midwestern appellants the validity of the Commission's orders insofar as they prescribe divisions as between Midwestern lines and Mountain-Pacific lines. The scope and importance of the issues presented by the jurisdictional statement of these appellants therefore have not been diminished by the partial vacation of the Commission's orders.

SUMMARY OF ARGUMENT

I.

The Commission made fully adequate findings on all issues relating to the revenue requirements of the groups of carriers that were material to its decision to increase the divisions of the Midwestern group, and it was error for the court below to hold otherwise. The Commission made findings on the revenue requirements of the two groups of carriers both in terms of the relative cost of service and in terms of more general revenue needs. Those findings show that the Commission gave due consideration to the question of revenue requirements, that it appraised the evidence bearing on that question, and that it plainly stated

its conclusions on the issues material to decision of that question and the reasons for those conclusions. Its findings therefore comply with the requirements of the Interstate Commerce Act and the Administrative Procedure Act. *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 227-228; *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U. S. 173, 192-194.

The Commission based its decision to order moderate increases in the divisions of the Midwestern lines on the relative cost of service and not on the more general revenue needs of those carriers. (R. 1034, 1086) The Commission's findings on relative costs set forth the costs in dollar amounts and also the dollar revenue of each of the two groups of railroads from the existing divisions and the percentage relationships between dollar revenue and dollar cost. (R. 1009)

From these findings the Commission further found substantial discrepancies in favor of the Mountain-Pacific lines between the revenue from existing divisions and the relative costs of the two groups of carriers in providing the service in issue. (See pages 16-17, *supra*) It was on the basis of these discrepancies, not general revenue needs, that the Commission decided to increase the divisions of the Midwestern lines.

The premise of the holding below that the Commission was required to make dollar findings on revenue needs was that the Commission increased the divisions of the Midwestern lines to reflect general revenue needs, and appellees attempt to justify the holding on that ground. The fact that the Commission decided to increase the divisions of the Midwestern lines on the basis of relative costs therefore destroys the premise of the holding below and the

arguments by which appellees attempt to justify it. The Commission fulfilled its obligations under the Interstate Commerce Act and the Administrative Procedure Act by making findings on relative costs in terms of dollars. Furthermore, on any view of the matter, the Commission fulfilled those obligations by making findings on general revenue needs in terms of relative rates of return on investment.

The absence of dollar findings of general revenue needs does not show that the Commission disregarded its statutory obligation to give "due consideration" to the general revenue needs of the contending groups of carriers, including those of the Mountain-Pacific lines. The reports of the Commission show that it considered the question of general revenue needs carefully and in detail. The Commission's findings plainly state both the conclusions that it reached on this question and the reasons for those conclusions.

The Commission found that as between the Mountain-Pacific lines and the Midwestern lines the difference in revenue needs was not sufficiently great to justify the divisions proposed by the Midwestern lines but that those lines were entitled to moderate increases in their divisions on the basis of the evidence showing the relative cost of service. (R. 1086) The Commission found that there was no substantial basis in the evidence on general revenue needs that would warrant a finding either that the Mountain-Pacific lines were entitled to an increase in their divisions or that their present divisions were fair and should be maintained. (R. 1068) These findings were supported by other findings, including findings as to the return on investment earned by the two groups of carriers. The Commission found that the average rates of return for the two groups of carriers, based on the Commission's

valuation data for the period 1946-58, were 3.49 percent for the Midwestern lines and 4.64 percent for the Mountain-Pacific lines. (R. 1027)

It was error for the court below to reject as inadequate the Commission's findings on the revenue needs of the groups of carriers stated in terms of relative rates of return and to hold that instead the Commission should have made findings in terms of dollar amounts. Rates of return express the relationship between dollars of net income and dollars of investment. On accepted and traditional principles of economic analysis relative rates of return are a better standard for judging comparative financial condition and earning capacity than comparisons of dollar revenue. In a long line of decisions extending over forty years the Commission has consistently treated comparisons of rates of return as a proper and significant means of determining relative revenue needs. This Court has sustained Commission orders prescribing divisions made on the basis of findings on relative rates of return and without any findings stating in dollar amounts the relative revenue needs of the carriers concerned. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349; *Boston & Maine R.R.* v. *United States*, 371 U.S. 26, affirming *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962); cf. *New York* v. *United States*, 331 U.S. 284; *King* v. *United States*, 344 U.S. 254.

There is no merit in appellees' contentions that the Commission's findings on revenue needs are deficient because the Commission relied upon data that excluded revenue needs represented by passenger deficits. The Commission's reports show that it did not disregard passenger deficits or rely exclusively upon data that excluded these deficits. In appraising the relative revenue needs of the groups of

carriers involved it gave consideration to rates of return from all services, which necessarily reflected both freight income and passenger deficits. (R. 1027-1029) Those rates of return showed that the revenue position of the Mountain-Pacific lines, notwithstanding their relatively greater passenger deficits, was significantly better than that of the Midwestern lines, all services considered. Appellees are really arguing that because of their passenger deficits the Commission should have increased or maintained their present divisions even though those divisions had been determined to be unfair to the Midwestern lines in the light of their relative contribution to the cost of handling the traffic involved. This is an impermissible attack upon the Commission's judgment on the weight and economic significance of the evidence. *New England Divisions Case*, 261 U.S. 184, 204; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 359; *New York* v. *United States*, 331 U.S. 284, 335, 349. Under Section 15(6) of the Interstate Commerce Act the Commission was not required to give overriding weight to the passenger deficits of the Mountain-Pacific lines.

II.

The court below erred in holding that the Commission's orders were invalid because the Commission had failed to find "the dollar amount of return to the carriers resulting from the new divisions." (R. 1724) Appellees attempt to support this holding by arguing that such finding was required because the Commission increased the Midwestern divisions "to reflect" general revenue needs. Since the Commission did not increase the Midwestern divisions on that basis but on the basis of relative costs, the premise of this argument is invalid.

Because of the evidence bearing on the cost of service the Commission determined that the Midwestern lines should be given "moderate increases" in their divisions.

It found that the prescribed divisions would produce such "moderate" increases (R. 1039), and it reaffirmed this finding on reconsideration when it had before it tables comparing the existing divisions with those prescribed in terms of the percentages used in dividing the rates. (R. 1086) This Court has sustained orders of the Commission that rested upon similar comparisons and that were not supported by findings in dollar amount on the effect of the prescribed divisions. See *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, sustaining orders made in *Divisions of Freight Rates,* 148 I.C.C. 457 (1928), 156 I.C.C. 94 (1929); and *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, sustaining orders made in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 194 I.C.C. 729 (1933), 198 I.C.C. 375 (1934). These decisions sanction the administrative practice that the Commission has followed for many years in a long line of divisions cases, including major interterritorial cases, in which it has established new divisions without making dollar findings on the effect of the divisions prescribed.

In its reports the Commission stated its findings and conclusions, and the reasons and bases therefor, upon all of the issues of fact that were material to its decision to order "moderate increases" in the divisions of the Midwestern lines. The Commission's findings, therefore, comply with the Interstate Commerce Act and the Administrative Procedure Act and satisfy the standards prescribed in the decisions of this Court.

A finding on the dollar effect of the prescribed divisions is not required to enable this Court to pass upon any issues that are appropriate for judicial review. *I.C.C.* v. *Hoboken R. Co.,* 320 U.S. 368, 381. Appellees have made no contention that the prescribed divisions will not produce revenues that exceed by a substantial margin their costs as determined by the Commission. They have not contended

that the prescribed divisions create a relationship between appellees' revenues and costs as determined by the Commission which is arbitrary and unfair as compared with the same relationship for the Midwestern lines. Nor have appellees contended that the increases prescribed by the Commission are not moderate if the Commission's cost determinations are accepted as valid. Any such contentions would lack support in the record because divisional scales of prorating factors constructed from the costs determined by the Commission to be correct would produce divisions not substantially different from those prescribed by the Commission.

The conduct of the appellees themselves before the Commission indicates that findings stating in dollar amounts the effect of the prescribed divisions would provide no basis for an argument that the prescribed divisions are so grossly unfair to the Mountain-Pacific lines as to require judicial intervention. Although all of the facts with respect to the dollar effect of the prescribed divisions were in the possession of appellees, they did not in their petition for reconsideration ask the Commission to reopen the record and take evidence on the dollar effect of the prescribed divisions. And prior to the Commission's initial report the appellees in their requested findings submitted to the Commission and in their exceptions to the recommended report of the Hearing Examiners did not specifically ask the Commission to make findings in terms of dollars on the revenue effect of any divisions that might be prescribed. (R. 675-684, 823)

In the circumstances in this case, to set aside the Commission's orders and remand the case to the Commission for findings on the dollar effect of the prescribed divisions would prolong a proceeding that has already extended over 12 years for the sake of findings that are not necessary for the purpose of judicial review and that would be wholly formal in character.

III.

The District Court erred in holding that the Commission's orders were invalid because the Commission had failed to make findings as to the revenue needs of, and the financial effect of the new divisions on, each of the 300 individual carriers involved in the proceeding. (R. 1731, 1733) This holding rejects the Commission's administrative practice for more than 40 years of adjudicating interterritorial divisions cases under Section 15(6) on a carrier group basis and controlling decisions of this Court which have sanctioned that practice. *New England Divisions Case,* 261 U.S. 184, 196-197; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 82-83; *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349. The holding of the District Court would impose crippling limitations upon the Commission's statutory authority in major controversies over divisions and would defeat the purpose for which Section 15(6) was enacted. *New England Divisions Case,* 261 U.S. 184, 197.

Appellees attempt to explain away the holding of the District Court on the ground that it does not apply to each of the 300 carriers involved, but only to three carriers (The Denver and Rio Grande Western Railroad Company, known as the Rio Grande, and the Frisco and the Katy), who in petitions to the Commission for reconsideration asserted claims for special treatment. The attempted explanation cannot be reconciled with the opinion of the District Court. That opinion plainly holds that the Commission was required to make findings with respect to each of the 300 carriers involved, and the opinion leaves no doubt that the District Court intended that the Commission should be bound by this holding on remand. (R. 1725, 1728, 1731, 1733)

Appellees cannot salvage any part of the holding below by retreating to the position that the Commission's orders are invalid as applied to the Rio Grande, the Katy and the Frisco because of the lack of essential findings relating to those carriers. The Commission specifically considered and made adequate findings on the claims for special treatment advanced by the Rio Grande, Katy and Frisco. (R. 1080-1081, 1089-1091)

The Rio Grande's claim for special treatment results from a situation that the Rio Grande and the other Mountain-Pacific lines themselves created. In the proceedings before the Commission the Midwestern lines proposed that the Commission prescribe divisions over the Utah junctions (Ogden and Salt Lake City), where the Rio Grande interchanges Transcontinental traffic with other Mountain-Pacific lines. Such a prescription would have continued the existing equalization of divisions over competing routes between the Missouri River gateways and the Utah gateways. The Mountain-Pacific lines, including the Rio Grande, objected to the Midwestern lines' proposal on the grounds that the question of competitive conditions over routes through the Utah junctions was not in issue under the complaints and was of no concern to the Midwestern lines. The Commission rejected the proposal of the Midwestern lines and prescribed divisions over Denver and Pueblo, Colorado, where the Rio Grande interchanges Transcontinental traffic with Midwestern lines and thereby left the problem of equalization, which included subdivisions between the Rio Grande and other Mountain-Pacific lines, precisely where the Mountain-Pacific lines insisted it be left. (R. 1080-1081) The Rio Grande cannot complain of a situation for which it was responsible. *United States* v. *Tucker Truck Lines*, 334 U.S. 33, 36-37.

The claims for special treatment of the Katy and Frisco, who in the evidentiary hearings before the Commission were members of the Midwestern group, were that the divisions prescribed by the Commission would diminish the revenues of those two lines. (R. 1089-1091) The Commission considered estimates made by these lines with respect to the reductions in gross revenues before income taxes that would result from the prescribed divisions. (R. 1090) The Katy and the Frisco made no showing that required the Commission to give them more favorable divisions than those prescribed for the other Midwestern lines. The mere fact that the prescribed divisions will diminish the revenues of the Katy and Frisco does not demonstrate either that the Commission's findings are insufficient or that the prescribed divisions are unlawful. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 88-89.

IV.

The Commission's findings sustain its selection of scales of prorating factors as a mechanism for prescribing divisions and its prescription of minimum divisions. The appellees' arguments to the contrary are without substance and were not adopted by the court below as a ground for its decision.

Having found that the existing divisions were unjust, unfair and inequitable to the Midwestern lines because of the discrepancy between their share of the revenue from those divisions and their relative contribution to the cost of performing the service involved, the Commission had wide discretion in selecting a mechanism or remedy to correct this unlawful condition. This Court has held that it will not interfere with an agency's choice of remedy except where the remedy selected has no reasonable relationship to the unlawful condition that is to be redressed.

Phelps Dodge Corp. v. *Labor Board*, 313 U.S. 177, 194; *Board of Trade* v. *United States*, 314 U.S. 534, 547-48; *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 112-113. The Commission's selection of a scale of prorating factors was reasonably related to a statutory objective that the Commission was entitled to achieve because the scales were designed to produce the "moderate increases" in the Midwestern divisions that the Commission found were justified by its findings on relative costs.

The Commission made findings explaining its reasons for modeling the scales of prorating factors on class rate scales and those findings are supported by substantial evidence. (R. 1035, 1038-1039, 1077, 1079) The scales of prorating factors are not unlawful merely because their operation will reduce the revenues of the Mountain-Pacific lines. The Commission's determination that the Midwestern lines were entitled to moderate increases in their divisions necessarily meant that any mechanism selected by the Commission to produce those increases would diminish the revenue of the Mountain-Pacific lines. There is no support in the record for any argument that the scales selected would arbitrarily reduce the revenues of the Mountain-Pacific lines more than is reasonably appropriate to give the Midwestern lines the moderate increases to which they were entitled. In fact, if the Commission had constructed scales of prorating factors from the costs that it determined to be valid, those scales would have produced divisions less favorable to the Mountain-Pacific lines than the scales prescribed.

The fact that in other proceedings the Commission has sometimes used cost scales does not demonstrate that its selection in this case of divisional scales related to class rate scales was arbitrary, unreasonable or otherwise unlawful. *Virginian Ry. Co.* v. *United States*, 272 U.S. 658,

666; *Georgia Public Service Commission* v. *United States*, 283 U.S. 765, 775; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 359. The Commission has often used scales of prorating factors which were based on or related to class rate scales, as it did in the present case, and orders of the Commission using this mechanism for the prescription of divisions have been upheld by this Court. See *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, affirming orders entered in *Divisions of Freight Rates*, 148 I.C.C. 457 (1928), 156 I.C.C. 94 (1929); *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, affirming orders made in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729 (1933), 198 I.C.C. 375 (1934); and *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26, affirming order entered in *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960).

The Commission found that a 15 percent minimum primary division was supported (1) by the past practice of carriers in establishing divisional bases by agreement, (2) by the past practice of the Commission in prescribing minimum divisions, and (3) by "increasingly burdensome terminal costs in recent years." (R. 1036-1037) These findings were supported by substantial evidence. (R. 474-478, 482, 607) Appellees' arguments to the contrary amount to nothing more than an attack on the Commission's appraisal of the weight of the evidence, on the inferences that the Commission has drawn from the evidence, and on the judgment of the Commission on a matter of transportation economics.

V.

Even if it is assumed *arguendo* that the court below properly remanded the case to the Commission for new

and additional findings that court erred in declining to retain jurisdiction to require equitable resettlement of the divisions involved on the basis of any valid order prescribing lawful divisions that the Commission might thereafter make in the reopened proceeding.

The Commission found that the present divisions are unjust, unreasonable and inequitable to the Midwestern lines. The decision of the court below did not invalidate that finding but was directed solely to the findings made by the Commission in support of its prescription of new divisions. The finding of the Commission that the present divisions are unlawful gives rise to equities that the court below should have protected once it had exercised its injunctive powers to stay temporarily the enforcement of the Commission's orders. There is no basis for any assumption that in a reopened proceeding the Commission would be unable to prescribe lawful divisions. Appellants' request that the court below retain jurisdiction to require resettlement of the divisions involved on the basis of any lawful order that the Commission might thereafter make (R. 1736, 1739-1745) is supported by decisions of this Court. *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301, 312-314; *United States* v. *Morgan,* 307 U.S. 183, 196, 198; *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 620-621.

ARGUMENT

I.

THE COMMISSION MADE ADEQUATE FINDINGS ON THE REVENUE REQUIREMENTS OF THE CONTENDING GROUPS OF CARRIERS

A. The District Court Erred in Holding That the Commission's Orders Were Invalid Because of the Asserted Absence of Findings in Terms of Dollars

The District Court held that the Commission's findings were insufficient because the Commission had failed to make

findings "in terms of dollars" on the revenue needs of the contending groups of carriers. (R. 1724, 1732-1733)[31] This holding is erroneous. The Commission made fully adequate findings on all issues relating to the revenue requirements of the groups of carriers that were material to its decision to increase the divisions of the Midwestern group.

Section 15(6) of the Interstate Commerce Act provides that in prescribing divisions the Commission shall give due consideration to the amount of revenue required by the carriers "to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." The courts and the Commission have construed this language as indicating required revenue in two senses, one being broader than the other. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 360. In one sense, the language refers to the amount of revenue required to pay the operating expenses, taxes and a fair return on railroad property attributable to the particular service covered by the divisions that are at issue. The revenue required for this purpose has been traditionally described by the Commission as the "cost of service," and that terminology was used by both the Commission and the parties in the instant case.[32]

[31] The District Court also held that dollar findings were required "not only as to the groups of roads involved but with respect to each carrier affected in said groups." (R. 1733) This point is discussed at pages 78-87, *infra.*

[32] The Commission has often held that the relative cost of service is a primary factor to be considered in prescribing fair and equitable divisions. See, for example, *New England Divisions,* 66 I.C.C. 196, 199 (1922); *Divisions of Freight Rates,* 203 I.C.C. 299, 335 (1934); *Official-Southwestern Divisions,* 287 I.C.C. 553, 565 (1953). In this case the Commission said that in prescribing divisions "it is the relative contribution of the parties, in terms of costs, that furnishes the initial indication of what is just and equitable among the carriers." (R. 1076)

In its broader sense, the "revenue required" clause of Section 15(6), taken together with the "public importance" clause of the section, indicates revenue requirements that are more general than those arising from the cost of service. In appropriate circumstances the Commission may determine that the general financial requirements of a group of carriers justify divisions that give them an amount of revenue from the service involved greater than they would receive on the basis of their relative contributions to the costs of that service. To justify such a determination the Commission must find that the increased divisions are required in the public interest to maintain the carriers in effective operation as a part of an adequate transportation system. *New England Divisions Case*, 261 U.S. 184, 194-195; *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274, 284-285.

In the instant case, the Midwestern and Mountain-Pacific groups each contended that its revenue requirements in the broader sense entitled it to a share of revenue from the service involved greater than could be justified on the basis of the relative cost of that service. The parties, the Commission and the court below described the issue raised by these contentions as related to the "revenue needs" of the carriers. The holding of the District Court now under consideration is directed to "revenue needs" in this broader sense, and is a holding that the findings of the Commission are deficient because they do not state in terms of dollars these general revenue requirements of the three groups of carriers.

The holding of the District Court is wrong both because it disregards the basis upon which the Commission increased the divisions of the Midwestern lines and because it imposes upon the Commission requirements for findings

that are not justified by the Interstate Commerce Act, the Administrative Procedure Act, or the decisions of this Court.

1. The Decision of the Commission to Increase the Divisions of These Appellants was Based on Relative Cost of Service and the Commission Made Findings in Terms of Dollars on Such Cost

In this case the Commission gave due consideration to the alleged general revenue requirements of the contending groups of carriers. The Commission, however, did not base its decision to increase the divisions of the Midwestern lines on their general revenue needs, but instead relied on relative cost of service. It follows that findings on the dollar amount of general revenue needs were not necessary or material to its decision and their absence does not vitiate the Commission's orders. The appellees themselves have taken the position that the necessity for findings on the dollar amount of revenue needs arises only if the Commission changes divisions on that basis. They made this concession before the Commission.[33] The same concession is im-

[33] In their exceptions to the recommended report of the Examiners, the Mountain-Pacific lines took the position that when divisions are changed on the basis of general revenue needs, there must be "a finding of the amount of revenue necessary to accomplish the objective required by the public interest." (R. 816) They then added (R. 816-817):

> "A transfer of revenues based exclusively on proof of the parties' relative cost contributions to the service performed, and not in any degree involving the public interest, may presumably be ordered whatever the amount. On the other hand, when the costs are not determined, and the transfer rests solely, as proposed here, upon the dominant interest of the public in the maintenance of a necessary transportation service, it must be known what the public need is in both territories, and whether a specific transfer from one group to the other will, on balance, help or hurt the overall public interest."

plicit in their arguments in this Court. In those arguments they have recognized that the validity of their attack upon the Commission's findings requires them to demonstrate that the Commission increased the divisions of the Midwestern lines on the basis of revenue needs. They assert that the Commission prescribed divisions "expressly to reflect revenue needs" and that the Commission changed carrier revenues "for the purpose of meeting unstated and undetermined revenue needs." (Motion to Affirm of The Atchison, Topeka and Santa Fe Railway Company, et al., page 7)[34]

The appellees' assertions that the Commission raised the Midwestern divisions because of revenue needs are incorrect and disregard the Commission's plain statements to the contrary. The Commission increased the divisions of the Eastern lines on the basis of both costs and revenue needs. (R. 1033, 1036, 1076-1078) But in the case of the divisions of the Midwestern lines the Commission acted upon the basis of relative cost of service—not general revenue needs. The Commission made this explicit in its reports. The divisions involved in this appeal are the Midwestern divisions. The Commission stated that the increases in these divisions "were supported by the evidence concerning cost of service." (R. 1086) In its initial report the Commission found that the increases in the divisions of the Eastern lines should reflect revenue needs as well as cost of service (R. 1033), but in the very next sentence stated that it was dealing with the Midwestern lines on a different basis (R. 1034):

> "As between the defendants [Mountain-Pacific lines] and the other western railroads [Midwestern lines] the differences in earning power are less marked, but our consideration of the evidence bearing on cost of serv-

[34] Hereinafter sometimes referred to as "Motion to Affirm."

ice previously discussed convinces us that the primary midwestern divisions as a whole are too low."

The Commission rejected certain proposals or suggestions made by the Mountain-Pacific lines with respect to the level of the divisions between the Midwestern and the Mountain-Pacific lines on the ground that they reflected an understatement of the cost of service of the Midwestern lines (R. 1039); and the Commission also rejected the divisions proposed by the Midwestern lines because they "gave undue weight to their claimed revenue need." (R. 1086)[35]

Appellees attempt to support their assertion that the Commission increased the divisions of the Midwestern lines on the basis of revenue need by taking out of context one passage in the Commission's initial report in which it stated that the cost evidence did not provide "an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need." (Motion to Affirm, pages 7, 20; R. 1032) This statement read in context is plainly directed to the Commission's reasons for increasing the divisions of the Eastern lines.[36] It is not dis-

[35] The Commission did not act upon the basis of general revenue needs when it increased the divisions of the Midwestern lines in the section of Official Territory known as Group E-5, Southeastern Illinois. The Motion to Affirm described the controversy with respect to this traffic in these words (page 6): "The only other issue of any importance to the active appellant Midwestern railroads is the 15 percent minimum division prescribed by the Commission on transcontinental freight traffic to and from Southeastern Illinois." The Commission found that this 15 percent minimum division was justified by the past practice of the carriers and the Commission in establishing minimum divisions and by "increasingly burdensome terminal costs in recent years." (R. 1036-1037; see pages 102-104, *infra*.)

[36] This statement was made in the introductory passage of the Commission's discussion of "Required revenue" in its initial report and, as the context shows, was directed to the entire controversy

puted that the Commission increased the Eastern divisions on the basis of both costs and revenue needs; but it does not follow that the Commission acted on the same basis when it ordered increases in the Midwestern divisions. Its own statements show that as to those divisions it acted on the basis of relative costs.

Appellees also advert to the fact that when the Commission constructed divisional scales for application between the Midwestern and Mountain-Pacific lines it did not, as a matter of arithmetic, use cost figures for that purpose. (Motion to Affirm, page 20) This argument confuses the Commission's reasons for deciding to increase the divisions of the Midwestern lines with the particular mechanical method that it used to achieve the increases that it believed the cost evidence justified. The fact that the Commission decided as a matter of arithmetic or mechanics to use integer scales related to the class rate scales instead of scales constructed mathematically from cost figures does not show that the Commission decided to increase the divisions of the Midwestern lines because of their general revenue needs.[37] As we have pointed out the Commission explicitly said the contrary in its reports.

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then before the Commission, which included the controversy over the divisions of the Eastern lines as well as the controversy over the divisions of the Midwestern lines. The statement was followed by the passage, referred to above, in which the Commission distinguished the divisions of the Eastern lines from those of the Midwestern lines, saying as to the former that they should be increased to reflect revenue needs as well as costs and, as to the latter, that although the differences in the earning power of the two groups of railroads were "less marked" the evidence bearing on cost of service showed that the Midwestern divisions were too low. (R. 1032-1034)

[37] Appellees' attack on these integer scales is discussed at pages 87-101, *infra*.

The Commission's decision to raise the divisions of the Midwestern lines on Transcontinental traffic was supported by findings on relative costs that were made in terms of dollars. These findings set forth both the costs in dollar amounts and also the dollar revenue of each of the two groups of railroads from the existing divisions and the percentage relationships between this dollar revenue and the dollar costs. (R. 1008-1009)[38] On the basis of the relative costs as determined by the Commission it found that under the existing divisions on the Midwestern-Transcontinental traffic the revenue of the Mountain-Pacific lines exceeded their out-of-pocket costs by 71 percent while the revenue of the Midwestern lines exceeded their out-of-pocket costs by only 39 percent. (R. 1012) The Commission further found that in the case of the Midwestern divisions on Official-Transcontinental traffic the revenue of the Mountain-Pacific lines exceeded their out-of-pocket costs by 57 percent, whereas the revenue of the Midwestern lines exceeded their out-of-pocket costs by only 43 percent. (R. 1012) It was these discrepancies between revenue from the existing divisions and the relative costs of the two groups of carriers in providing the service in issue, not general revenue needs, that led the Commission to increase the divisions of the Midwestern lines.

These findings of the Commission on relative costs were sufficient in form, not vitiated by error of law and supported by substantial evidence. It is significant that the District Court, although accepting many of the other arguments advanced by the Mountain-Pacific lines, did not hold the cost findings of the Commission invalid. Indeed, the District Court observed in its opinion (R. 1723):

[38] These dollar amounts reflected costs and revenues for the sample of traffic analyzed in the cost study of the Mountain-Pacific lines. (See page 15, *supra.*)

> "Whether there is sufficient evidence for the Commission to arrive at the costs of service, and the data and information and method used, is within the discretion of the Commission, absent an abuse thereof."[39]

The fact that the Commission decided to increase the divisions of the Midwestern lines on the basis of relative costs and supported that decision by findings on the dollar amount of those costs destroys the premise of the arguments that appellees advance to justify the decision below. Since the Commission did not increase those divisions "to reflect" the general revenue needs of the Midwestern lines, it was not required to find the dollar amount of those needs either to explain or to justify its action.[40]

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[39] Appellees criticize the appellants on the ground that they have not asked this Court to pass upon the issues raised by appellees' attack in the District Court on the Commission's cost findings and charge that appellants are attempting to have this Court "brush off these significant questions." (Motion to Affirm, pages 22, 23) These are odd assertions. The appellants properly confined their questions presented to questions actually decided by the District Court. It would appear that appellees do not intend to ask this Court to sustain the judgment of the District Court on the ground, not adopted by that court, that the Commission's cost findings are defective, perhaps in deference to the usual practice of this Court not to review an administrative record in the first instance. (Motion to Affirm, page 23) Appellees are entitled to invoke this practice, but they cannot at the same time assert that the cost findings are invalid. If appellees do not ask this Court to affirm the judgment below on the ground that the Commission's cost findings are defective, then for the purposes of this appeal those findings should be assumed to be valid.

[40] Because the Commission here did not increase the Midwestern divisions to meet all or a part of some undetermined revenue need appellees' reliance upon the footnote in *Chicago, M., St. P & P. R. Co.* v. *Illinois*, 355 U.S. 300, 309-310, note 8 is misplaced. (Motion to Affirm, page 11) That case involved the validity of an order increasing intrastate rates made by the Commission under Section 13(4) of the Interstate Commerce Act. The Commission had justi-

2. The Commission's Findings on the General Revenue Needs of the Carrier Groups, Cast in Terms of Rates of Return, Show That it Gave Due Consideration to This Factor

In deciding to increase the Midwestern divisions on the basis of relative costs the Commission did not disregard its statutory obligation to give "due consideration" to the general revenue needs of the contending groups of carriers, including those of the Mountain-Pacific lines, and the absence of dollar findings on general revenue needs does not indicate otherwise. The Commission's reports show that it considered the question of general revenue needs carefully and in detail. The Commission's findings plainly state both the conclusions that it reached on this question and the reasons for those conclusions. They therefore comply with the legal standards for the adequacy of findings that are established by Section 14(1) of the Interstate Commerce Act and Section 8(b) of the Administrative Procedure Act.

The Commission devoted 25 pages of its reports to a discussion of and findings on the issue of revenue needs. (R. 1015-1029, 1032-1034, 1066-1075) In its initial report the Commission made findings covering, among other things, net railway operating income from all services, freight revenue, passenger deficits, and rates of return for the postwar period for the contending groups of carriers. (R. 1015-1029) On the latter point the Commission found that

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fied the increase on the ground, among others, that it would make a "fair" contribution in the amount of $77,000 to payment of the indirect costs and taxes of the carrier but had made no finding as to the amount of those indirect costs and taxes. In the instant case the Commission increased the Midwestern divisions to adjust the discrepancy between the Midwestern lines' revenues from the existing divisions and their contribution to the cost of the service involved. The Commission made findings in dollar amounts as to both the revenues and the costs.

the average rates of return for the three groups of carriers, based on the elements of value determined from the Commission's valuation data, for the period 1946-1958 were 3.40 percent for the Eastern lines, 3.49 percent for the Midwestern lines, and 4.64 percent for the Mountain-Pacific lines. (R. 1027)[41]

The Commission made findings on the relative revenue needs of the three groups of carriers. These findings, which have been described at pages 16-20, *supra*, may be summarized as follows: The Commission found that the revenue needs of the Eastern lines were greater than those of either the Mountain-Pacific lines or the Midwestern lines. (R. 1027) It found that as between the Mountain-Pacific lines and the Midwestern lines the differences in revenue needs were less significant, but that the Midwestern divisions should be raised on the basis of the evidence relating to relative cost of service. (R. 1034) It rejected the contention of the Midwestern lines that they were entitled to higher divisions than those prescribed because of their greater general revenue needs. (R. 1086) It rejected the contention of the Mountain-Pacific lines that the prescribed divisions did not give due recognition to the public interest and to their greater revenue needs, finding that there was no substantial evidence that would warrant a finding either that they were entitled to an increase in their divisions or that their present divisions were fair and should be maintained. (R. 1068) It found that it had given due recognition to the revenue needs of the Mountain-Pacific lines in the

[41] The Commission also found rates of return based on the carriers' book investment for the same period. They were 3.26 percent for the Eastern lines, 3.34 percent for the Midwestern lines and 3.89 percent for the Mountain-Pacific lines, (R. 1027) The Commission found that rates of return based on the Commission's valuation data should be given "controlling weight." (R. 1020)

higher divisional factors prescribed for application to hauls in Mountain-Pacific Territory. (R. 1079)[42]

In these findings, the Commission plainly stated its conclusions on the relative revenue needs of the groups of carriers and its reasons for those conclusions. The District Court nonetheless held the findings insufficient on the ground that "the mandate of Section 15(6) requires a finding in terms of dollars." (R. 1724) It rejected as inadequate the Commission's findings on the revenue needs of the groups of carriers stated in terms of relative rates of return. The court did not attempt to explain its reasons for this rejection but in a passage in its opinion, whose meaning is in certain respects obscure, simply concluded that findings stated in terms of relative rates of return are not sufficient to show that the Commission gave "due consideration" to that statutory factor of revenue need.[43]

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[42] Those factors are 10 percent higher than the factors prescribed for application to hauls in Midwestern Territory. (R. 1039, 1079)

[43] The relevant passage in the opinion below follows (R. 1732-1733): "Divisions in general, defendants urge, are made on the basis of 'rate of return' figures which are equivalent to divisions in terms of dollars. The court concludes that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved, as they do not disclose a determination or consideration of all the required elements in arriving at what the Commission concludes are just, reasonable and equitable divisions."

The appellants did not urge that divisions "are made on the basis of" rate of return figures; they contended that the findings stated in terms of relative rates of return and the other findings relating to revenue needs showed that the Commission had given due consideration to the factor of revenue needs. (R. 1349, 1460-1461, 1470-1478, 1481) The divisions prescribed by the Commission are not "divisions in rates of return" or "divisions so stated," but are percentages of rates determined by the use of mileage scales of prorating factors. (R. 1101-1105)

Both reason and authority demonstrate the error of this conclusion.

The financial vigor, and particularly the capacity to earn profits, of the carriers involved, as demonstrated by experience, is the most reliable basis for a judgment on their relative revenue needs. The rates of return earned by the carriers on their property devoted to transportation service are the best test of their financial health and earning capacity. The Commission therefore discharged its statutory obligation when it considered, along with the other revenue needs evidence, the revenue needs of the carriers in terms of their relative rates of return, which were, of course, derived from dollar figures, and made appropriate findings from that evidence.[44]

Traditionally economists, bankers, investment analysts and the courts have used rates of return, not absolute dollar amounts, for the purpose of comparing the financial condition and earnings of one enterprise or group of enterprises with those of another. The reason is plain. Comparisons of dollar revenues in themselves throw no light on the comparative financial condition and earning capacity of different enterprises.[45] A large dollar revenue may rep-

[44] The rates of return were determined by deducting from gross dollar revenue the dollar amount of operating expenses and taxes and then relating the net dollar revenue (termed "net railway operating income" in the Commission's accounting rules) to the dollar value of the property held for or used in transportation service. (Exhibit MW-608, R. 111, 507-509, 1027)

[45] Throughout the proceedings before the Commission, all parties treated rates of return as significant data bearing on revenue needs. In their opening brief before the Commission (R. 675-684), and again in their exceptions to the recommended report of the Hearing Examiners (R. 823), the Mountain-Pacific lines requested the Commission to make sixty findings on the subject of revenue

resent a low rate of return and low earning capacity while a much smaller dollar revenue may represent a higher rate of return and high earning capacity, depending in each case upon the size of the investment base involved. For the Commission to make an intelligent comparison of the needs for additional revenue, it was necessary to take the additional step of relating dollar amounts of revenue to dollar amounts of capital used to produce the revenues and to find, as the Commission did, the resultant ratios which by common usage are termed rates of return. It follows that findings of revenue needs in dollar amounts were not required and indeed would not in themselves have enabled the Commission to give due consideration to the relative revenue requirements of the groups of carriers involved. On the contrary, sound principles of economic analysis dictated that the Commission make findings, as it did, in terms of relative rates of return.[46]

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needs, thirty of which were printed under the subheading "General" and thirty under the subheading "Computation of Rates of Return." Despite the suggestion in their exceptions with respect to divisions based on cost contributions (see note 33, page 45, *supra*), and despite the fact that they were asking the Commission to prescribe divisions on the basis of general revenue needs, the Mountain-Pacific lines did not in their requested findings ask the Commission to make findings that expressed revenue needs in terms of dollars.

[46] In major interterritorial divisions cases prior to the instant case, the Commission consistently treated comparisons of rates of return as a proper and significant means of determining relative revenue needs. *New England Divisions*, 66 I.C.C. 196, 202 (1922), order upheld, *New England Divisions Case*, 261 U.S. 184; *Alabama & Mississippi R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 95 I.C.C. 385, 402-403 (1925); *Divisions of Freight Rates*, 148 I.C.C. 457, 476 (1928), 156 I.C.C. 94, 103 (1929), order upheld, *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74; *Atchison, T. & S. F. Ry. Co.* v. *B. & O. R. Co.*, 174 I.C.C. 321, 330-331 (1931); *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, 752-755 (1933), 198 I.C.C. 375, 382-384 (1934), order upheld, *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349; *Divisions of Freight Rates*, 203 I.C.C. 299, 328, 342 (1934), 208 I.C.C. 299 (1935);

The Commission's findings are also sanctioned by authority. This Court has sustained orders prescribing divisions that the Commission has made on the basis of findings on relative rates of return, but without any findings stating in dollar amounts the relative revenue needs of the carriers concerned. *Beaumont, S.L. & W. Ry Co.* v. *United States*, 282 U.S. 74;[47] *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349;[48] *Boston & Maine R.R.* v. *United States*, 371 U.S. 26, affirming *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962).[49] In *Beaumont* this Court set forth in its opinion the Commission's findings on relative rates of return and used those findings for the purpose of determining whether the Commission had acted properly in prescribing divisions on a group basis. 282 U.S. at 84-88.

Alton R. Co. v. *Akron, C. & Y. Ry. Co.*, 215 I.C.C. 317, 321 (1936); *Southwestern-Official Divisions*, 216 I.C.C. 687, 701-702, 739 (1936); *Southwestern-Official Divisions*, 234 I.C.C. 135, 143-146, 148 (1939); *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 186-187 (1939); *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.*, 235 I.C.C. 211, 237 (1939); *Official-Western Trunk Line Divisions*, 269 I.C.C. 765, 771 (1948); *Official-Southern Divisions*, 287 I.C.C. 497, 503-504 (1953), 289 I.C.C. 4 (1953); *Official-Southwestern Divisions*, 287 I.C.C. 553, 564 (1953), 289 I.C.C. 11, 12 (1953); *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491, 502 (1960), order upheld, *Boston & Maine R.R.* v. *United States*, 208 F.Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26; *Akron, C. & Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 316 I.C.C. 351, 361 (1962), order set aside, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 225 F.Supp. 584 (D. Colo. 1964).

[47] The Commission's findings on relative rates of return appear in *Divisions of Freight Rates*, 148 I.C.C. 457, 476 (1928).

[48] The Commission's findings on relative rates of return are found in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, 754 (1933), and 198 I.C.C. 375, 382-383 (1934).

[49] See *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491, 502 (1960).

And in *Baltimore & Ohio R. Co.*, where the Commission in prescribing divisions on citrus traffic had relied heavily upon the less favorable financial position of the Southern carriers, the Court sustained the Commission's findings even though they included no findings on the revenue needs of the Southern roads stated in dollar amounts and even though this Court stated that "the question whether the carriers in the southern or northern group were in the worse financial position was a close and difficult one." 298 U.S. at 361.

This Court has also sustained a rate order of the Commission which was supported by findings on relative revenue needs stated simply in terms of relative rates of return. In *New York* v. *United States*, 331 U.S. 284, the Commission had ordered a general readjustment of the class rate structure in the eastern, southern and western areas of the United States. Section 15a(2) of the Interstate Commerce Act provides that in the exercise of its rate making power the Commission shall give "due consideration" to, among other factors, "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management" to provide adequate and efficient service. 49 U.S.C. § 15a(2). In that case the Commission made no findings on the revenue needs of the carriers in dollar amounts but did make findings on their relative rates of return. This Court in its opinion referred to these findings (331 U.S. at 329) and held that they indicated that the Commission had given due consideration to revenue needs. 331 U.S. at 347-349. And in *King* v. *United States*, 344 U.S. 254, this Court held that when the Commission, in the exercise of its power under Section 13(4) of the Interstate Commerce Act, prescribes intrastate rates for the purpose of removing a discrimination or burden from interstate commerce it is not required to make findings in

dollars either as to "what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income" or as to "what amount of revenue was required to enable these railroads to operate efficiently." 344 U.S. at 274.[50]

There is no merit in the arguments with which appellees attempt to justify the holding of the court below. They assert that findings on relative rates of return are insufficient to show "due consideration" of revenue needs because they do not measure the "amount of revenue required" but instead reflect only what the carriers actually earned in the past, and specifically do not reflect "the amount of revenue needed for capital improvements and other investments necessary to meet service obligations in a growing territory." (Motion to Affirm, page 8) The notion embodied in this argument appears to be that because the appellees argued to the Commission that they needed more dollars for future capital improvements or other investments than the other contending groups the Commission was required to respond to this contention with findings stated in terms of dollars.[51]

The fact is that the Commission did respond to appellees' arguments. It made findings specifically directed to and rejecting those arguments. (See page 20, *supra.*) It found, among other things, that the evidence did not support appellees' contentions that the investment needs of the

[50] In *Public Service Commission of Utah* v. *United States,* 356 U.S. 421, 427, a later Section 13(4) case, over-all rate of return comparisons (without reference to dollar amounts) were considered by this Court as appropriate indicators of relative need for additional revenue from intrastate freight service.

[51] Appellees asserted this claim in general terms only, specifying no particular projects or needs, and hence gave no specific amounts of money allegedly needed.

Mountain-Pacific lines for new equipment and facilities were greater than those of the other groups of carriers, finding that in this respect there was no difference in the degree of revenue need among the groups of carriers. (R. 1033)[52] There is no basis for an argument that the Commission failed to give "due consideration" to appellees' arguments on the alleged revenue needs of those lines.

Appellees appear to be arguing that the Commission's finding that the general revenue needs of the Mountain-Pacific lines for investment purposes were no greater than those of the other groups of carriers is defective because it was not accompanied by a finding as to the dollar amounts (which they did not specify) of the asserted revenue needs. But the Commission in its findings was not required to deal with appellees' contentions in this detail. Their argument to the contrary is the kind of an attack on administrative

[52] In their motion to affirm the State of California and its Public Utilities Commission characterize this finding of the Commission as a "cryptic pronouncement" and assert that the Commission did not resolve the issues as to the alleged needs of the Mountain-Pacific lines for investment funds. (Page 6) There was nothing "cryptic" about the Commission's finding. It was a plain and unequivocal rejection of the contention of the Mountain-Pacific lines, supported by California, that their investment needs for new equipment and facilities were greater than those of the other groups of carriers. In other passages in its reports the Commission considered the conditions in the Mountain-Pacific states that were alleged to give rise to this claimed extraordinary need for investment funds and the arguments that the Mountain-Pacific lines addressed to those conditions, and gave its reasons for rejecting the arguments. (See, for examples, R. 1015-1017, 1025-1027, 1031-1033, 1077) The assertion that the Commission did not consider the contention of the Mountain-Pacific lines that they had an extraordinary need for investment funds and did not resolve the issues raised by this contention simply disregards the findings in the Commission's reports.

findings that was made in *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173, and rebuffed by this Court. There, the opponents of the Commission's order had made certain arguments before the Commission that were inconsistent with the conclusions that the Commission ultimately reached. They contended in this Court that the Commission's findings were insufficient under the Administrative Procedure Act because they were not made in the specific terms in which the arguments had been advanced. This Court rejected the contention pointing out that the Commission had discussed and considered their arguments and that "the law required no more." 361 U.S. at 192-193. The principle applied there is applicable here.

The Commission's reports show that it gave due consideration to the "revenue required" by the two groups of carriers in both the narrow and broad senses of that statutory term. It made findings in dollar amounts on the relative costs of the Midwestern and Mountain-Pacific lines and on their revenue from the traffic in question. On the basis of those findings, it found that the existing divisions were unjust, unreasonable and inequitable to the Midwestern lines, and that those lines should be given "moderate increases" in their divisions. It considered the evidence relating to the broader revenue needs of the two groups of carriers in the light of the public interest and found that there was no difference in those needs as between the Mountain-Pacific and the Midwestern carriers that would justify either the maintenance of the present divisions or an increase in the divisions of the Mountain-Pacific lines. In short, the Commission's findings show that it considered the evidence, gave due consideration to the revenue needs of the two groups of carriers, and plainly stated its conclusions and the reasons therefor. Nothing more was required by the Interstate Commerce Act, the Administrative

Procedure Act, or the decisions of this Court; and it was error for the court below to hold otherwise. *Alabama G.S. R. Co* .v. *United States,* 340 U.S. 216, 227-228; *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173, 192-194.

B. The Commission's Findings on General Revenue Needs Show That It Gave Due Consideration to Passenger Deficits

There is no merit in appellees' contention that the Commission's findings on revenue needs are deficient because "the Commission erred in its reliance upon data which did not reflect revenue needs from all transportation services but, instead, excluded revenue needs represented by passenger deficits."[54] (Motion to Affirm, page 31) The Com-

[53] Appellees argue that the requirements imposed by Section 8(b) of the Administrative Procedure Act on findings are stricter than those that existed prior to its enactment, and that decisions of this Court sustaining the sufficiency of Commission findings before the enactment of the section are therefore not authoritative. (Motion to Affirm, page 11) There is no merit in this contention. Long before the enactment of the Administrative Procedure Act this Court laid down the same requirements for the sufficiency of administrative findings that are now embodied in Section 8(b). See *Beaumont, S.L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 86; *United States* v. *Chicago, M. St. P. & P. R. Co.,* 294 U.S. 499, 510-511; *Eastern Central Association* v. *United States,* 321 U.S. 194, 211-212. See also *S.E.C* v. *Chenery Corp.,* 318 U.S. 80, 94-95. So far as concerns the sufficiency of findings, Section 8(b) simply codified the existing law. See Davis, *Administrative Law Treatise,* Vol. 2, Sec. 16.02, page 437 (1958).

[54] We submit that the District Court did not hold the Commission's findings insufficient on this ground as appellants contended in their Motion to Affirm. (Page 31) That court held that the findings were defective because they did not state in dollars the

mission did not disregard passenger deficits or rely exclusively upon data that excluded those deficits. In appraising the relative general revenue needs of the groups of carriers involved, extended consideration was given to rates of return from all services. (R. 1027-1029) These rates of return reflected both freight income and passenger deficits. They gave full effect to the passenger deficits and showed that the revenue position of the Mountain-Pacific lines, notwithstanding their relatively greater passenger deficits, was significantly more advantageous than that of either the Midwestern lines or the Eastern lines, all services considered.

Appellees attempt to support their argument by reference to certain passages in the Commission's reports in

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general revenue needs of the groups of carriers and individual carriers involved. In a concluding passage of its opinion the court, having held that the Commission was required to make dollar findings on revenue needs, added that the findings should further show that the Commission had "considered the revenue needs of the carriers for all transportation services, including needs represented by passenger deficits." (R. 1733) Since the court elsewhere in its opinion did not discuss the Commission's treatment of passenger deficits and did not even suggest, much less conclude, that the Commission had erred in its consideration of those deficits, this language should be read not as a holding that the Commission had erred in this respect but as a cautionary dictum. If, however, the court's language were to be construed as a holding, it would be a subordinate part of a broader holding that the Commission's findings that compared revenue needs in terms of relative rates of return were insufficient. On that hypothesis the assumed holding would be a subsidiary question fairly comprised within the second question presented in the Jurisdictional Statement which covers the validity of the Commission's findings on revenue needs. The discussion of the second question in appellants' Jurisdictional Statement emphasized that the Commission's findings on revenue needs showed rates of return "from all services," which necessarily included passenger services. (Pages 8, 16, 17, note 14, 19)

which it referred to the financial position of the Eastern railroads as "freight carriers." Since the controversy involved the division of revenues from freight rates, and since the only net revenue available for division was freight revenue, it was proper for the Commission to consider the relative positions of the railroads involved as freight carriers. The significant fact is that even the statements cited by the appellees show that the Commission did not exclude passenger deficits in appraising revenue needs. This is notably illustrated by the passage in the initial report, referred to by appellees (Motion to Affirm, page 32), in which the Commission concluded that the Eastern railroads were in a "less advantageous situation as freight carriers." (R. 1027) The next two sentences in the report support this conclusion by reference to the rates of return from all services which, as we have shown above, fully reflected passenger deficits. (R. 1027)[55]

The Commission's reports thus show that in determining the question of relative revenue needs the Commission gave due consideration to both freight revenues and passenger deficits. Its findings cannot be criticized as deficient in their discussion of passenger deficits. The findings explain the Commission's conclusions on the significance of those deficits and the reasons for the conclusions and therefore satisfy the requirements of Section 14(1) of the Interstate

[55] The same thing is true of passages in the supplemental report of the Commission relating to the Eastern lines, cited by appellees (Motion to Affirm, page 32), which show on their face that the Commission considered both net railway operating income from all services and freight net railway operating income. (R. 1074-1075, 1077)

Commerce Act and Section 8(b) of the Administrative Procedure Act.[56]

Appellees' argument is in substance simply an attack on the Commission for having refused to give the passenger deficits of the Mountain-Pacific lines controlling importance in fixing divisions of joint freight rates. This is readily apparent when the argument is considered in relation to the Commission's reasons for finding that the Midwestern lines should receive moderate increases in their divisions. That determination was made, as we have explained above, on the basis of the Commission's findings on relative cost of service and not on the basis of relative general revenue needs. (See pages 45-50, *supra*.) The passenger deficits could not affect the Commission's findings on

[56] The findings show that the Commission considered passenger deficits as bearing upon the comparisons of rates of return from all services (R. 1023); as relevant in appraising trends in the earning power of the carrier groups involved (R. 1023-1026); as significant in relation to the contentions of the Mountain-Pacific lines that their investment in freight facilities had not produced an adequate return (R. 1026) and that their divisions should be increased to provide funds for investment in new facilities (R. 1033, 1068); and as important in relation to the contention of the Mountain-Pacific lines that controlling weight should be given to comparisons of net railway operating income from all services in the three-year period 1955-1957, when the disparity in the passenger operating ratios of the Eastern and Western railroad groups reached its maximum. (R. 1075)

Four pages of the Commission's supplemental report were devoted to a consideration of the arguments made by the Mountain-Pacific lines on the matter of passenger deficits. (R. 1070-1075) The discussions and findings there found and those appearing in the initial report (R. 1023-1026, 1028) plainly show that the controversy over the Commission's consideration of passenger deficits related, predominantly, to relative general revenue needs as between the Eastern lines and the Mountain-Pacific lines.

relative costs one way or another and appellees do not contend otherwise. Appellees are therefore arguing that because of their passenger deficits the Commission should have increased or maintained their present divisions even though those divisions had been determined to be unfair to the Midwestern lines in the light of their relative contribution to the cost of handling the traffic involved. There is no warrant in law for this contention.

This Court has held that Section 15(6) of the Interstate Commerce Act does not establish any single test for determining just, reasonable and equitable divisions. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359. Certainly the section does not obligate the Commission to give overriding importance to the passenger deficits of the Mountain-Pacific lines. Certainly it does not obligate the Commission to fix or to preserve divisions that require the Midwestern lines, in addition to carrying the burden of their own passenger deficits, to absorb the passenger deficits of the Mountain-Pacific lines. The Commission's refusal to prescribe divisions on any such arbitrary basis did not rest upon any novel or surprising principle. In a line of divisions cases extending over many years, cited and discussed in the supplemental report, the Commission has declined to give controlling weight to passenger deficits in determining revenue needs. (R. 1074-1075) See *Divisions of Freight Rates,* 148 I.C.C. 457, (1928), affirmed in *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 194 I.C.C. 729, 753, 755 (1933), affirmed in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349; *Southwestern-Official Divisions,* 216 I.C.C. 687, 698, 708 (1936); *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.,* 235 I.C.C. 211, 236-237 (1939); *Official-Western Trunk Line Divisions,* 269 I.C.C. 765, 772 (1948); *Gardner* v. *Akron, C. & Y. R. Co.,* 272 I.C.C. 529, 573 *ff.* (1948).

In this case the Commission made findings on relative rates of return that fully reflected passenger deficits and which show that, all aspects of the evidence considered, the revenue needs of the Mountain-Pacific lines are not as great as those of the Midwestern carriers. In these circumstances appellees' contention that the Commission should have disregarded its findings on relative costs and reached a result favorable to the Mountain-Pacific lines simply on the basis of their passenger deficits is an impermissible attack upon the Commission's judgment on the weight and economic significance of the evidence. *New England Divisions Case*, 261 U.S. 184, 204; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 359; *New York* v. *United States*, 331 U.S. 284, 335, 349.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION WAS REQUIRED TO MAKE FINDINGS SHOWING IN DOLLARS THE DIFFERENCE BETWEEN THE REVENUES UNDER THE DIVISIONS FOUND UNLAWFUL AND THE REVENUES UNDER THE PRESCRIBED DIVISIONS

The court below also held that the Commission's orders were invalid because the Commission had failed to find "the dollar amount of return to the carriers resulting from the new divisions." (R. 1724) This holding, like the holding that the Commission was required to make dollar findings on revenue needs, depends upon the erroneous assumption that the Commission increased the divisions of the Midwestern lines because of their revenue needs. Appellees attempt to justify the holding on that ground by arguing that because the Commission prescribed divisions "to reflect" revenue needs it was required to make findings on

the dollar effect of its orders.[57] Since, as we have shown earlier (pages 45-50, *supra*), the Commission did not increase the divisions of the Midwestern lines on the basis of their revenue needs, this holding of the court below is erroneous for the same reasons that vitiate the holding that there must be dollar findings on the amount of revenue needs.

The Commission's cost findings demonstrated that the revenue of the Midwestern lines from the existing divisions was not commensurate with their relative contribution to the cost of the service. (See pages 16-17, *supra*.) On that basis, the Commission found that the existing divisions of the Midwestern lines were unjust, unreasonable and inequitable and should be changed (R. 1034, 1086), and that those lines should be given "moderate increases" in their divisions. The Commission found that the divisions it prescribed would produce such moderate increases. (R. 1039, 1086)

These findings are clearly adequate. To paraphrase the language of Section 8(b) of the Administrative Procedure Act, they contain a statement of the findings and conclusions of the Commission as well as the reasons or basis therefor upon all the issues of fact or law presented on the record that are material to the Commission's decision

[57] The appellees assert that the Commission prescribed divisions "expressly to reflect revenue needs without finding . . . the financial effect of its orders" (Motion to Affirm, page 7), and that the Commission's orders dispose of money "on the asserted basis of revenue needs without finding what those revenue needs are or how they would be affected by the order." (*Id.*, page 9)

to order "moderate increases" in the divisions of the Midwestern lines. Neither the court below nor the appellees have advanced any reason to support the conclusion that the findings are insufficient for judicial review merely because they do not contain a finding on the dollar effect of the prescribed divisions.[58]

This Court has held that upon review of a Commission order prescribing divisions the issues that require judicial consideration are limited. *I.C.C.* v. *Hoboken R. Co.*, 320 U.S. 368, 381. A finding stating in dollars the difference between the revenue from the divisions found to be unlawful and the revenue from the divisions prescribed is not required to enable this Court to determine those issues. Specifically, such a finding is not necessary to enable this Court to determine that in the present case the Commission did not attempt to achieve any purpose beyond its statutory powers, that it gave due consideration to all of the factors specified in Section 15(6), and that its essential findings are supported by substantial evidence. And the record provides no basis on which appellees could reasonably argue that such a finding would enable them to prevail on any of these issues.

As we have pointed out above, the Commission, while giving due consideration to all of the factors set forth in Section 15(6), determined to increase the divisions of the Midwestern lines because of the existing relationship between relative costs and revenue. It found that the existing relationship was unfair as to the Midwestern lines and should be adjusted. It found that "moderate increases" in

[58] In their sixty requested findings on the subject of revenue needs set forth in their opening brief before the Commission (R. 675-684), and renewed in their exceptions to the recommended report of the Hearing Examiners (R. 823), the Mountain-Pacific lines did not specifically request the Commission to make findings in terms of dollars on the revenue effect of any divisions that might be prescribed. None of the parties made any such request prior to the submission of the case to the Commission.

the divisions of the Midwestern lines would bring the relationship more in conformity with the standard of fairness and equity prescribed by the statute. This was a result that Section 15(6) of the Interstate Commerce Act authorizes the Commission to achieve. There is, therefore, no ground on which it could be asserted that the Commission's orders were an attempt to achieve an end beyond the limits of its authority.

There is likewise no basis for an argument that the Commission's finding that the prescribed divisions gave the Midwestern lines "moderate increases" is unsupported by substantial evidence in the record as a whole. The Commission had before it evidence with respect to the existing divisions, the revenue from those divisions, relative costs, the lengths of haul in the territories involved, and the estimated revenue effect of different divisional scales, including the 29886 scales.[59] It was, therefore, in a position to make an informed and experienced judgment that the increases it prescribed were "moderate" in character.[60] It is

[59] One of the witnesses for the Mountain-Pacific lines testified about a method of estimating the revenue effect of divisional integer scales, including the 29886 scale which the Commission used as a basis for the scales that it prescribed for application as between the Midwestern and the Mountain-Pacific lines. (Exhibit T-650) The Commission referred to the testimony of this witness in rejecting both the divisions proposed by the Mountain-Pacific lines and another possible basis for divisions covered in the testimony of the witness. The Commission's rejection of both alternatives was based on the ground that neither of them would afford the Midwestern lines revenue that was commensurate with their relative contribution to the costs of performing the service involved. (R. 1038-1039) The Commission's discussion of the testimony of this witness immediately preceded its finding that the divisional scales prescribed would produce "moderate increases in some of the most important midwestern divisions." (R. 1039)

[60] The Commission was not required to make findings explaining the "mental operations" that led it to the conclusion that the prescribed divisions were "moderate." *Baltimore & Ohio R. Co.*

significant that although appellees have attacked the Commission's orders and findings on a variety of grounds, they have not so far asserted that the increases prescribed for the Midwestern lines are not "moderate." It can be demonstrated from cost figures in the record, whose use is sanctioned by the Commission's findings, that the increases prescribed by the Commission are not immoderate or excessive in relation to relative costs. If the Commission, as a matter of mechanics, had constructed divisional scales of prorating factors from those costs, those scales would have produced divisions not substantially different from the divisions prescribed by the Commission.[61] Divisional scales constructed on that cost basis and applied to the average hauls on either side of the Mountain-Pacific border (1,272 miles in Mountain-Pacific Territory and 978 miles in Midwestern Territory) would give the Mountain-Pacific lines 57 percent of the revenue for hauls in Mountain-Pacific Territory and the Midwestern lines 43 percent for their hauls in Midwestern Territory.[62] The scales in fact pre-

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v. *United States,* 298 U.S. 349, 359-360. In appraising the record before it the Commission was entitled to rely upon its expert knowledge and cumulative experience. *Board of Trade* v. *United States,* 314 U.S. 534, 547; *New York* v. *United States,* 331 U.S. 284, 328; *N.L.R.B.* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349.

[61] The costs referred to are the costs that were used in computing the aggregate Rail Form A costs, for the sample of traffic covered in the cost study of the Mountain-Pacific lines, that are set forth in the Commission's findings. (R. 1008-1009) The Commission found that the differences between these Rail Form A costs and the Commission's restated costs, which were the basis of its cost findings, were not significant and that the one set of costs substantiated the other. (R. 1011-1012)

[62] The average hauls of 1,272 miles in Mountain-Pacific Territory and 978 miles in Midwestern Territory are *territorial* averages of all railroads in each territory, and are different from the average hauls

scribed by the Commission, as applied to these average hauls, give the Mountain-Pacific lines 58 percent of the revenue and the Midwestern lines only 42 percent of the revenue.[63]

This evidence also serves to show that the record will not support an argument that the dollar effect of the prescribed divisions is so grossly unfair and unjust to the Mountain-Pacific lines that the Commission's order should be regarded as arbitrary and capricious. It indicates that the prescribed divisions leave the Mountain-Pacific lines with revenues from the traffic involved that still exceed their costs as determined by the Commission by a substantial margin. Appellees have attacked the formal sufficiency of the Commission's findings and they have contended that its cost determinations are not supported by substantial evidence. It is significant, however, that they have not asserted that if those cost determinations are valid, the dollar effect of the divisions prescribed is so grossly unfair to

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of groups of carriers previously mentioned (page 14, *supra*), which would include hauls of the involved traffic by the five major Mountain-Pacific lines in Midwestern Territory. The territorial average hauls are shown in Exhibit T-632, R. 112, 557 (see also R. 1032); and the costs in cents per hundredweight are 58.1 for 1,272 miles in Mountain-Pacific Territory and 44.7 for 978 miles in Midwestern Territory. (Exhibit MW-773, R. 126, 639).

The relative percentages of revenues that the Mountain-Pacific and Midwestern lines would receive if the rates were divided according to costs, 57 and 43, respectively, should not be confused with the percentages, also 57 and 43, by which the revenues of the Mountain-Pacific and Midwestern lines, respectively, from Official-Transcontinental traffic exceed their out-of-pocket costs of handling such traffic. (R. 1012; see page 16, *supra*) The coincidence of the percentages is wholly fortuitous.

[63] The prescribed divisional factors were 404 for 1,272 miles in Mountain-Pacific Territory and 294 for 978 miles in Midwestern Territory. (R. 1101-1102)

the Mountain-Pacific roads as to require judicial intervention. It is particularly significant that they made no such assertion in their petition to the Commission for reconsideration.[64] Those appellees are in no position to assert that they could not have made such an assertion because of the absence of a finding of dollar effect by the Commission. Prior to the filing of their petition for reconsideration, they had in their possession all the facts required to lay a basis for the assertion.[65]

In the court below and here, appellees, while insisting upon the necessity for a finding on the dollar effect of the prescribed divisions, have not suggested that if such a finding had been made it would demonstrate that the prescribed divisions so drastically reduce the revenues of the Mountain-Pacific lines that the divisions are unfair and inequitable considered in relation either to the costs as determined by the Commission or to any other relevant standard of fairness and equity. They have not asserted that the pre-

[64] Unlike the objecting carriers in *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74 (see *Divisions of Freight Rates*, 156 I.C.C. 94, 95 (1929)), and the Katy and the Frisco in the present case, the Mountain-Pacific lines did not ask the Commission to reopen the record and take evidence on the dollar effect of the prescribed divisions.

[65] The Mountain-Pacific lines knew the amount of their revenues from the existing divisions. They had facts that would have enabled them to apply the prescribed divisions to at least a sample of their traffic, as, for example, the sample covered by their own cost study and by the cost findings of the Commission. They were thus in a position to plead dollar amounts and to assert that they showed that the prescribed divisions were grossly unfair to them. It should be noted that the Katy and the Frisco made a showing of the dollar amount of their loss of revenue in support of their petition for reconsideration. (See pages 86-87, *infra*.) It should also be noted that although the Katy and the Frisco asked the Commission to reopen the proceedings so that they might show the revenue effect of the prescribed divisions on them, the Mountain-Pacific lines made no such request. (R. 1089-1091)

scribed divisions will not be compensatory for the service involved. They make no contention that the prescribed divisions will not produce revenues that exceed by a substantial margin their costs as determined by the Commission.

It is permissible to surmise that in this instance appellees' caution is the child of fact. As a result of the interlocutory orders entered by the District Court and instructions thereafter issued by the Commission there is now information in the public records of the Commission that makes it possible to estimate with reasonable accuracy the dollar effect of the prescribed divisions.[66] On the basis of this information it appears that on an annual basis the Midwestern appellants would receive approximately $11,638,000 more revenue from the prescribed divisions than they receive from the existing divisions.[67] From the record it is possible to estimate that this amount would increase the

[66] The interlocutory orders of the District Court permitted the Mountain-Pacific lines to retain the difference between the existing and prescribed divisions pending a final determination of the validity of the Commission's orders, but imposed upon them an obligation to account for the differences in the event that the orders were sustained, (R. 1196-1200, 1259-1264) The Commission through its Bureau of Accounts required the Mountain-Pacific lines to set up reserves to provide for the payments that would be required in the event the Commission's orders are sustained and also required them to set forth in their quarterly and annual reports to the Commission the amounts covered by these reserve accounts. The Midwestern lines were likewise required to disclose in their quarterly and annual reports to the Commission the additional amounts of revenue that they will receive if the Commission's orders are upheld. (Commission Accounting Circular No. 134 issued on November 27, 1963, and supplements thereto.)

[67] The Mountain Pacific lines' $1,730,525,000 average annual freight revenue 1946-1958 (R. 1016) thus would have been reduced by less than seven-tenths of one percent.

revenue of the Midwestern appellants on the traffic in question by approximately 11 percent and decrease the revenue of the Mountain-Pacific lines from that traffic by less than 4 percent.[68] A decrease in the revenue of the Mountain-Pacific lines in this order of magnitude provides no basis for an argument that merely because of their dollar effect the prescribed divisions are arbitrary and unreasonable or that the Commission disregarded its statutory obligations "to make divisions that colloquially may be said to be fair." *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 357.

There is implicit in the holding of the District Court and in the arguments advanced by appellees to support it the erroneous notion that when the Commission prescribes new divisions it is in effect transferring property from one group of carriers to another and that it must, therefore, make a finding on the monetary value of the property transferred.[69] This notion rests upon an erroneous concept of the nature of the Commission's power over divisions. This Court has held that when the Commission divides joint rates it is not partitioning property, but is exercising a power that is akin to, or an aspect of, the Commission's authority to prescribe the rates themselves.[70] *New England Divisions Case,* 261 U.S. 184, 195; *I.C.C.* v. *Hoboken R. Co.,* 320 U.S. 368, 381. This Court has never held that when the Commission prescribes rates, a finding

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[68] The methods and sources used in the computation of these percentages are explained in Appendix D to this brief.

[69] The court below stated that the Commission must "find the dollar amount of return to the carriers resulting from the new divisions, in order to arrive at the required determination as to whether the new divisions are 'just, reasonable and equitable.'" (R. 1724-1725)

[70] As the Commission aptly observed in *New England Divisions,* 66 I.C.C. 196, 203 (1922), divisions are "parts of rates."

in dollars of the difference between the revenue from existing rates and the revenue from the rates prescribed is indispensable to the validity of its action. Indeed, it has sustained the Commission's prescription of rates in the absence of such a finding. See *New York* v. *United States*, 331 U.S. 284. There is no rational basis for a conclusion that the Commission must define in dollars the consequence of its order when it prescribes a division of joint rates but is not required to do so when it prescribes the rates themselves.

The appellees rely heavily upon the fact that in other divisions proceedings the Commission has made findings on the dollar effect of its orders, citing, *inter alia*, *Official-Southern Divisions*, 325 I.C.C. 1 (1965).[71] The fact that the Commission has made findings of this character in some cases does not establish that the findings were indispensable to the legality of the Commission's orders. The cases cited by appellees can be matched by a larger number of proceedings, including major interterritorial divisions cases, in which the Commission made no such findings.[72] In its report on reconsideration the Commission stated that the contention of appellees that such findings "have traditionally been made in other divisions cases in which the revenue need doctrine has been invoked is not valid." (R. 1069) What is of more significance than the cases cited by

[71] Appellees also cite *Louisville & N. R. Co.* v. *Akron C. & Y. R. Co.*, 309 I.C.C. 491, 493 (1960), upheld, *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26; *Louisville & N. R. Co.* v. *Southern Ry. Co.*, 319 I.C.C. 639, 661 (1963), upheld, *Carolina & N. R. Co.* v. *United States*, 234 F. Supp. 112 (W.D. No. Car. 1964), affirmed, 380 U.S. 526. (Motion to Affirm, pages 12-13)

[72] In most of the major interterritorial divisions cases, which are listed at note 46, pages 55-56, *supra*, the Commission did not make dollar findings concerning the revenue effect of the divisions it prescribed. (R. 1069)

appellees is the fact that this Court has sustained divisions orders of the Commission in the absence of any findings on the dollar effect of the orders. See *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74; *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349.

In the *Beaumont* case the Commission in its report and order made no finding on the dollar effect of the divisions prescribed. See *Divisions of Freight Rates,* 148 I.C.C. 457 (1928).[73] Indeed, in that case the Commission denied a petition for rehearing in which the petitioners sought leave to introduce evidence to show the revenue effect in dollars of the interterritorial divisions prescribed. See *Divisions of Freight Rates,* 156 I.C.C. 94, 95 (1929). Mr. Eastman writing for the Commission stated in words that are pertinent here that it was not the Commission's purpose "to compromise between the claims of the two groups of carriers, but to establish a basis of divisions in line with the evidence, whatever the revenue results might prove to be," and that the precise dollar effect of its prescription was "not in itself of probative force." *Id.* at 95. The denial of rehearing was sustained on review in the District Court, *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 36 F.2d 789, 798 (W.D. Mo. 1929), and the point was not raised in this Court, which affirmed the District Court's judgment sustain-

[73] In that case, one group of carriers, in advancing a proposed new basis for divisions, presented the Commission with an estimate in dollars of the probable revenue effect of their proposal. 148 I.C.C. 459. The Commission, however, did not adopt the proposed divisions, but instead prescribed divisions of its own devising. It made no dollar findings with respect to the revenue effect of the divisions prescribed, but compared both the existing divisions and those proposed with the divisions prescribed simply in terms of percentages used in dividing the rates. 148 I.C.C. 478-480.

ing the Commission's order. 282 U.S. 74.[74] Similarly, in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, the orders of the Commission sustained were not supported by findings on the dollar effect of the divisions prescribed even though the Commission's decision was based primarily on the general revenue needs of the Southern railroads.[75]

Appellees' insistence that the orders of the Commission must be annulled because there is no finding of the dollar effect of the prescribed divisions should be considered in the light of the equities and realities of this litigation. The Commission, in both its initial and supplemental reports, has found that the existing divisions are unjust, unreason-

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[74] The figure of $3,000,000 *per year* referred to in the opinion of this Court as the estimated additional income that would accrue to certain carriers under the prescribed divisions (282 U.S. at 81) was derived from the petition for reopening and rehearing filed with the Commission. *Divisions of Freight Rates,* 156 I.C.C. 94, 95 (1929). It was not embodied in the findings or order of the Commission.

[75] See *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 194 I.C.C. 729 (1933), and 198 I.C.C. 375 (1934).

The only discussion by the Commission in that case of the revenue effect of the prescribed divisions is in its report on reconsideration. That discussion was devoted to the position of the northern lines. 198 I.C.C. at 381. The Commission, speaking of the prescribed basis of divisions said: "So far as we are able to estimate from data of record, it would afford the northern lines more revenue than they would receive under the former basis of rates and divisions . . ." *Ibid.* The Commission then compared the percentages of the rates which would accrue to northern lines under the prescribed basis with those applicable under the former divisional basis. This comparison is not unlike the comparisons which the Commission had before it in the present case at the time it issued its supplemental report and which it said confirmed its finding that the prescribed divisions would result in "moderate increases" for the Midwestern lines. (See note 23, page 26, *supra,* and R. 1086)

able and inequitable. (R. 1040, 1093) Those findings are sufficient in form and supported by substantial evidence. The appellants have endured the divisions found to be unlawful for more than 40 years. For 12 years they have been striving in this proceeding to obtain relief. The Commission found that the prescribed divisions would be just, reasonable and equitable. (R. 1040, 1047-1049, 1093, 1101-1105) The Commission's considered and informed judgment that the prescribed divisions would not produce unfair and arbitrary consequences had a reasonable basis in the record and has now been confirmed by experience. (See pages 69-74, *supra*) In these circumstances to remand this case to the Commission for the sole purpose of having it make a finding of the dollar effect of the prescribed divisions could serve no useful purpose and would be wholly formal and ceremonial in character. See *Luckenbach S.S. Co.* v. *United States*, 122 F. Supp. 824, 829 (S.D. N.Y. 1954), affirmed 347 U.S. 984.

Appellees are not to be criticized for their natural desire to continue for an indefinite time to collect and to keep the divisions found by the Commission to be unlawful. Appellants earnestly submit, however, that nothing in the Interstate Commerce Act, the Administrative Procedure Act, or the principles of judicial review requires this Court to assist appellees in that endeavor.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION WAS REQUIRED TO MAKE FINDINGS WITH RESPECT TO EACH OF THE THREE HUNDRED INDIVIDUAL CARRIERS COVERED BY ITS ORDERS

In addition to holding the Commission's orders invalid on the grounds discussed above the District Court also

held that they were invalid because the Commission had failed to make indispensable findings on each of the 300 individual carriers involved in the proceeding. Specifically, the court held that the Commission was required to make findings "as to the revenue needs of and the financial effect of the new divisions on each carrier involved" (R. 1731), and that it was also obliged to make findings covering each of the statutory factors specified in Section 15(6) of the Interstate Commerce Act "not only as to the groups of roads involved but with respect to each carrier affected in said groups." (R. 1733)

This holding rejects controlling decisions of this Court and more than 40 years of administrative practice under Section 15(6) which these decisions have sanctioned. Beginning in 1923 with the *New England Divisions Case,* 261 U.S. 184, which was the first case to come to this Court under Section 15(6), the Court has held that in controversies between groups of railroads over the division of numerous joint rates applicable to traffic between different territories, the Commission may make the required statutory determinations and prescribe bases for divisions between the groups of carriers without taking specific evidence or making separate adjudications "in respect to each division of each rate of each carrier." *New England Divisions Case,* 261 U.S. 184, 196-197; *Beaumont, S.L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 82-83; *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349. In these cases this Court sustained Commission orders that were not supported by findings with respect to each of the individual carriers involved.[76] In the same decisions, the Court laid

[76] In response to a point made in the Motion to Affirm (pages 24-25), it should also be observed that in these cases the Commission made no finding that the prescribed divisions "would have a uniform impact upon the individual members of the carrier

down the rule that when the Commission prescribes divisions on a group basis it may do so "upon evidence which it reasonably may deem typical" of the rate structure, divisions and carriers involved. *Beaumont, S.L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 83. But the rule that permits the Commission to act upon "typical evidence" does not require it to make findings with respect to each of the individual carriers involved in a group divisions case.

In reliance upon the decisions cited above the Commission has consistently followed the practice of determining major interterritorial divisions controversies upon findings made in terms of the groups of carriers involved.[77] In some instances the Commission has made findings with respect to individual carriers whose situation throughout the proceeding was treated as atypical, as it did, for example, in respect to the Norfolk Southern Railway Company in *Official-Southern Divisions,* 325 I.C.C. 1 (1965),

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groups." Nothing in the Commission's findings or in the opinion of this Court supports appellees' suggestion that the 15 percent increase in the *New England Divisions Case* had such a uniform impact; an increase that is uniform in percentage points for all carriers may have diverse effects upon the revenue and profits of different carriers depending upon length of haul, the consist of traffic, variations in traffic conditions and other circumstances. The observation in *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 87, is pertinent: "It is impossible to make divisions that will yield the same rate of profit to each carrier or upon every commodity or shipment moved by it." In that case, where the Commission did not make separate findings as to each carrier involved, this Court held that the fact that the divisions prescribed had a different revenue impact upon different carriers did not establish that the divisions were unjust and unreasonable. 282 U.S. at 87-88.

[77] In the major interterritorial divisions cases cited in note 46, pages 55-56, *supra,* the Commission did not make findings concerning all of the individual carriers.

cited by appellees. In some instances the Commission has made findings relating to individual railroads for purposes of illustration or, as it did here in the case of the Katy, the Frisco and the Rio Grande, for the purpose of dealing with particular contentions advanced by individual railroads. But the Commission did not in any of the cases heretofore cited (note 46, pages 55-56, *supra*) make findings as to the revenue impact of the prescribed divisions upon each of the individual carriers involved.

The decisions of this Court and the administrative practice of the Commission rest on sound principles of statutory interpretation and application. The holding of the District Court would impose crippling limitations upon the Commission's exercise of its statutory authority in major controversies over divisions. The requirement that the Commission make findings as to each individual carrier involved presupposes that the Commission will take and analyze evidence as to each carrier. In the present case there were 300 carriers whose divisions were affected. Even when the controversy was dealt with on a group basis the administrative process was laborious and time-consuming. The preparation and presentation of evidence extended over five years. The Commission itself required 21 months to analyze the Examiners' recommendations, the evidence, and the contentions of the parties, and to prepare its initial report and order. In a case of this magnitude the requirement that the Commission take evidence and make findings with respect to each of the carriers involved would defeat rather than promote the purpose for which Section 15(6) was enacted. As this Court observed in the *New England Divisions Case*, 261 U.S. 184, 197:

> "Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. . . . To require

> specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them."[78]

In this Court, appellees have made no attempt to defend the holding that the Commission is required to make findings with respect to each of the carriers involved. Instead, they now assert the District Court did not mean what it said, and that its words should be construed as requiring individual findings for only three carriers, who, in their petitions to the Commission for reconsideration, asserted claims for special treatment. (Motion to Affirm, pages 24, 30)[79] This attempt to rewrite the opinion below for the purposes of appeal does not deserve serious consideration.[80] The words of the court below were clear and ex-

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[78] This Court has similarly held that the Commission is not required to make findings with respect to individual rates when it exercises its powers under Section 13(4) of the Interstate Commerce Act. *United States* v. *Louisiana*, 290 U.S. 70, 75-76; *King* v. *United States*, 344 U.S. 254, 275.

[79] The three carriers are the Rio Grande, the Frisco and the Katy.

[80] Appellees are in no position to assert that the appellants "distort and misconstrue" the decision below. (Motion to Affirm, page 24) The breadth of the holding of the court below was directly responsive to appellees' arguments. In their opening brief in that court they argued that "The Commission has failed to find and determine the financial effect of its orders upon the individual carriers . . . in violation of Section 15(6) . . ." (Page 28) In their requested conclusion of law No. 9 they asked the lower court to hold that the Commission had failed to make findings as to "the amount of revenue required by individual carriers, the financial effect of the new divisions upon individual carriers, and the extent to which the new divisions provide the amount of

plicit; it said that findings were required "as to each individual carrier in each division" (R. 1728); "as to each carrier involved" (R. 1725, 1731); and "not only as to the groups of roads involved but with respect to each carrier affected in said groups." (R. 1733) These words mean exactly what they say, and it is clear that the court below intended that the Commission should be bound by them on remand.

Appellees cannot salvage any part of the holding below by retreating to the position that the Commission's orders are invalid at least as applied to the Rio Grande, the Katy and the Frisco because of the lack of essential findings relating to those carriers. In its supplemental report the Commission considered the contentions made on behalf of these carriers and stated its conclusions on those contentions and the reasons therefor. (R. 1080-1081, 1089-1091) There is, therefore, no lack of essential findings. The argument of the three lines, although cast in the form of an attack on the sufficiency of findings, is in fact an attack on the merits of decisions which were made by the Commission on issues within its statutory competence and which have a rational basis in the record.

Prior to the filing of its petition for reconsideration the Rio Grande made no claim that its position differed in any significant respect from that of the other Mountain-Pacific lines. It collaborated with those lines to present evidence, which was asserted to be typical for the group as a whole, on traffic, rates, revenues, divisions, costs, transportation conditions and other relevant matters. It did not present any evidence to the Commission indicating a need or desire

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revenue required by individual carriers . . . " (R. 1513) In the light of these statements it is not surprising that the lower court understood that appellees were contending that findings were necessary with respect to each of the carriers involved. (R. 1722-1723, 1725-1726)

for individual treatment. Its present claim for special treatment arises from a situation that exists only because the Rio Grande and the other Mountain-Pacific lines objected to a proposal that the Midwestern lines made for dealing with it.

The Rio Grande operates a line between Colorado junctions (Denver and Pueblo) and Utah junctions (Ogden and Salt Lake City) that is a link in Transcontinental routes that are competitive with other routes between the Missouri River gateways (Council Bluffs and Kansas City) and the Utah gateways. (R. 1080) Under the existing structure of divisions, the divisions for service between the Missouri River gateways and the Utah junctions are equalized over all of the competitive routes. To preserve this competitive equalization the Midwestern lines proposed during the proceedings that the Commission should prescribe divisions that broke at the Utah junctions. This proposal would have required the Commission to prescribe subdivisions as between the Rio Grande and the railroads performing service in Midwestern Territory between the Missouri River gateways and the Colorado junctions. The Rio Grande and the other Mountain-Pacific lines objected to this proposal on the ground that the prescription of subdivisions for services of the Mountain-Pacific lines within Mountain-Pacific Territory was beyond the issues presented by the complaints before the Commission, and on the further ground that the Midwestern lines had no legitimate interest in such subdivisions. (R. 880-883, 1080-1081) As a result the Commission rejected the Midwestern lines' proposal. Instead it prescribed divisions that broke at the Colorado junctions on the border of Mountain-Pacific Territory (approximately 600 miles east of the Utah junctions), and it did not prescribe subdivisions of the primary divisions as between the railroads operating in Mountain-Pacific Territory. (R. 1039, 1101-1105)

The revenue that the Rio Grande will receive for its services west of Denver and Pueblo will, therefore, depend upon agreements that it may make with other Mountain-Pacific lines for subdivisions of the primary divisions prescribed by the Commission for service in Mountain-Pacific Territory. Failing agreement the Rio Grande can, of course, resort to the Commission for relief. Like all other Mountain-Pacific lines, the Rio Grande will incur some loss of revenue because the divisions prescribed are lower than the existing divisions which the Commission found to be unjust and inequitable. But the Rio Grande's contention that its loss of revenue will be extraordinary in amount and requires that it be given special treatment is contingent and conjectural because it depends upon the level of subdivisions that ultimately may be made between the Rio Grande and other Mountain-Pacific lines either by agreement or by Commission order. The Commission was not required to make findings on, or to grant relief for, an alleged loss of revenue that depends upon contingencies and conjecture.

In these circumstances, the Commission properly held that the question of the Rio Grande's subdivisions with other Mountain-Pacific lines and of the equalization of divisions over the competitive routes to the Utah gateways "is left precisely where the transcontinental defendants insisted that it be left." (R. 1081) The Commission did not abuse its discretion in thus denying the Rio Grande's claim for special treatment when the Rio Grande was itself responsible for the situation giving rise to the claim. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37.

In the proceedings before the Commission, the Katy and the Frisco associated themselves with the Midwestern group. (R. 1, 6, 8, 493) They joined with that group in pre-

senting typical evidence demonstrating the characteristics of the traffic, revenues, economic conditions, and costs in the area served by the group. The two roads presented no evidence differentiating their individual situations from those of the other carriers in the Midwestern group. They asked for and were accorded by the Commission the same treatment given to the other Midwestern carriers. Their complaint on reconsideration was in substance simply that the Commission had not adopted the basis of divisions proposed by the Midwestern lines and that the lower basis prescribed by the Commission would diminish their revenues. (R. 1089-1091) This decrease was caused by the impact of the Commission's orders on divisions of the Katy and the Frisco on certain traffic, notably lumber, which were particularly favorable because they were higher than the general level of divisions in Midwestern Territory. (R. 1090)[81] The two carriers made no claim before the Commission that the prescribed divisions were not compensatory in terms of their costs.

Contrary to the suggestion implicit in appellees' argument, the Commission did not act upon the petition of the Katy and the Frisco in ignorance of the revenue impact of the prescribed divisions. In its supplemental report the Commission noted the dollar amounts of revenue that each of the two lines asserted it would lose under the

[81] The Katy and the Frisco joined with the other Midwestern lines in presenting to the Commission a proposal for new divisions which would have decreased some of the favorable divisions enjoyed by the two lines. The substance of the complaint made in their petition for reconsideration was that the Commission's order reduced these divisions more than their own proposal would have done. The Commission in its supplemental report pointed out that the petitioners' situation "was fully disclosed in the evidence of the midwestern lines and foreshadowed in the examiners' recommended report. The petitioners are therefore not in a position to claim that the effect of our decision was a surprise." (R. 1090-1091)

prescribed divisions. (R. 1090)[82] The Commission held that this loss of revenue was not a valid reason for making a special exception from its findings and orders for these two lines. (R. 1091)[83] Its decision was correct. The mere fact that the prescribed divisions will diminish the revenue of two Midwestern lines does not demonstrate that the Commission's findings are insufficient or that the prescribed divisions are unlawful. *Beaumont, S.L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 88-89.

IV.

THE COMMISSION MADE ADEQUATE FINDINGS IN SUPPORT OF ITS SELECTION OF SCALES OF PRORATING FACTORS AS A MECHANISM FOR PRESCRIBING DIVISIONS AND OF THE MINIMUM DIVISION PRESCRIBED

Appellees attempt to support the judgment of the District Court on the ground that the Commission's findings do not support the scales of prorating factors used as a method for determining divisions as between Midwestern and Mountain-Pacific railroads for services in Midwestern and Mountain-Pacific Territories or the Commission's prescription of a minimum primary division of 15 percent for movements from or to Group E-5 of Official Territory (Southeastern Illinois) and for Midwestern-Transcontinental traffic. (Motion to Affirm, pages 14-20) Appellees unsuc-

[82] These dollar amounts were simply reductions in gross revenue before income taxes.

[83] The Commission also observed that it had "expressly authorized departures from the prescribed basis to permit such grouping and equalization as interested carriers may agree upon in accordance with the wishes of the midwestern lines." (R. 1091, 1104)

cessfully urged these contentions upon the District Court, which did not adopt them as a ground of decision.[84]

The Commission's findings support both its selection of scales of prorating factors and its prescription of minimum divisions. Appellees' arguments, although stated in the form of attacks on the sufficiency of the Commission's findings, are in fact simply attempts to try *de novo* the wisdom of decisions that the Commission made in the exercise of its statutory discretion and that have rational support in the record.

A. The Commission's Findings Show a Rational Connection Between the Facts Found and the Scales of Prorating Factors Used by the Commission to Prescribe Divisions

Appellees assert that there is no rational connection between the facts found by the Commission and the scales of prorating factors that it used to prescribe divisions between the Midwestern and the Mountain-Pacific lines. (Motion to Affirm, page 14) The answer to this contention

[84] That the court below was not impressed by contentions of this character is indicated by the following passage from its opinion. (R. 1732):

> "Plaintiffs' contentions re unlawfulness of the findings, and failure to make findings in many instances, concern matters as to which the Commission has used what this court believes to be the particular *method* adopted by the Commission in its discretion, as a body of experts, in the determination of factors or elements of factors it is required by the statute to consider. Specific findings of the propriety of the use of information which the Commission, as experts in this field, considers to be sufficient and adequate re pertinent elements are not necessary. To require same would be to compel the Commission to justify each method and all facts considered in arriving at every factor involved in the making of new divisions. We hold this would exceed the requirements of Section 8(b) of the Administrative Procedure Act." (Emphasis by lower court.)

is apparent on the face of the Commission's findings. On the basis of its findings on relative costs the Commission determined that the existing divisions were unjust and unfair to the Midwestern lines and that they should have "moderate increases" in their divisions. (R. 1039, 1086) The Commission was entitled to exercise its discretion in selecting a mechanism that would produce the "moderate increases" that it found were justified. This Court has held that an administrative agency has wide discretion in selecting a remedy to correct an unlawful condition and that courts will not interfere with its choice except where the remedy selected has no reasonable relationship to the condition that is to be redressed. *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194; *Board of Trade* v. *United States,* 314 U.S. 534, 547-548; *American Power & Light Co.* v. *S.E.C.,* 329 U.S. 90, 112-113. The principle was applied to divisions in *Beaumont, S.L. & W. Ry. Co.* v. *United States,* 36 F. 2d 789, 799 (W. D. Mo. 1929), where the three-judge court upheld the use by the Commission of scales of prorating factors as a mechanism for dividing joint freight rates in the proportions found by it to be fair to the contending groups of carriers. The attack upon the Commission's choice of mechanism was not pursued in this Court, which affirmed the judgment sustaining the order of the Commission. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74.

In the present case, the Commission found that the prescribed scales of prorating factors would give the Midwestern lines the "moderate increases" to which they were entitled.[85] There was therefore no lack of rational relationship between the Commission's findings and its choice of the scales of prorating factors because the choice of the

[85] We have pointed out earlier that this finding is supported by substantial evidence. (See pages 69-74, *supra.*)

mechanism was directly and reasonably related to an end that the Commission's antecedent findings entitled it to achieve.

It is not necessary, however, to leave the matter in this posture. The Commission made findings that explain and support its choice of the scales of prorating factors used to prescribe new divisions between the Midwestern and the Mountain-Pacific lines.[86]

The Commission found that the pattern of the scales prescribed "reflects the 29886 scale, adjusted to conform to what the evidence herein required, with 10 percent higher factors in mountain-Pacific territory." (R. 1079)[87] It explained its reasons for using class rate scales as a foundation for the construction of the scales of prorating factors. It found: "We have in the past employed rate scales as a suitable foundation for constructing divisional scales to divide joint rates in proportions we deem proper under

[86] The scales consist of integers arranged in mileage blocks that are used to construct percentages that are used to divide joint rates. (R. 1101-1102) The way in which the scales operate has been explained at note 21, page 24, *supra*, and in Appendix C, *infra*.

[87] The Commission had prescribed "the 29886 scale" for use in determining divisions of joint rates on traffic between Official and Southwestern Territories in *Official-Southwestern Divisions*, 287 I.C.C. 553 (1953). The 29886 scale was modeled on a class rate scale that the Commission had prescribed in *Class Rate Investigation, 1939*, 281 I.C.C. 213 (1951). The integers in the first mileage block of the 29886 scale were related to the rates in the first mileage block of the class rate scale and the progression of the integers was related to the progression of the rates in the rate scale. As indicated in the text above, the scales prescribed by the Commission deviated from the 29886 scale in one significant respect: The prorating factors for service by the Mountain-Pacific lines in Mountain-Pacific Territory were 10 percent higher than those in the 29886 scale and accordingly 10 percent higher than those for service by Midwestern lines in Midwestern Territory. (R. 1039, 1079)

the evidence." (R. 1079)[88] And it further found that "it is reasonable to divide the rates to some extent in accordance with the way they are made." (R. 1079) It made findings explaining its reasons for making the factors for service by the Mountain-Pacific lines in Mountain-Pacific Territory 10 percent higher than those for service by the Midwestern lines in Midwestern Territory. It pointed out that the class rate scale prescribed for application within Mountain-Pacific Territory in *Class Rates, Mountain-Pacific Territory,* 296 I.C.C. 555 (1955), was a higher scale than the one on which the 29886 scale was based and that it was, therefore, "logical to provide a higher scale of divisional factors" for Mountain-Pacific Territory. (R. 1039) It further found that the 10 percent higher factors for Mountain-Pacific Territory "give fair recognition to the evidence as to cost of service and revenue needs." (R. 1079)

The record before the Commission contained extensive evidence relating to the nature, construction and possible application of different scales of prorating factors, including the 29886 scale. (R. 1035, 1038-1039, 1077, 1079) The Commission made findings stating its reasons for rejecting scales proposed by the parties or discussed in the testimony of the witnesses.[89] The Mountain-Pacific lines

[88] The Commission cited, *inter alia, Divisions of Freight Rates,* 156 I.C.C. 94, 96-97, 99 (1929); *New England Divisions,* 126 I.C.C. 579, 667 (1927); *Southwestern-Official Divisions,* 234 I.C.C. 135, 138, 140 (1939); *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175, 191 (1939); *Official-Western Trunk Line Divisions,* 269 I.C.C. 765, 777 (1948); *Official-Southern Divisions,* 287 I.C.C. 497, 527 (1953); *Official-Southwestern Divisions,* 287 I.C.C. 553, 580 (1953); *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.,* 309 I.C.C. 491, 511 (1960).

[89] In its supplemental report the Commission found (R. 1077):

> "We found it impossible to use any existing divisional scale, a cost scale, or any method suggested by the parties as an exclusive guide or specific pattern for the divisions to be prescribed."

presented a scale constructed on the basis of the costs that were computed in their cost studies. This scale would have provided factors for the service of the Mountain-Pacific lines in Mountain-Pacific Territory that on the average would have been 27 percent higher than the factors provided for the service of the Midwestern lines in their territory. (R. 1038) The Commission found that it "could not properly approve the use of these scales" because they were based on cost studies that "understate the costs of the midwestern lines." (R. 1039)

A witness for the Mountain-Pacific lines also testified with respect to a scale constructed by using the 29886 scale for movements in Midwestern Territory and a scale similarly constructed from the intraterritorial class rate scale applicable in Mountain-Pacific Territory (commonly referred to as the 30416 scale) for application within Mountain-Pacific Territory. That scale would have provided factors for the Mountain-Pacific lines that would have been 22 percent higher than the factors provided for the Midwestern lines. (R. 1039) The Commission rejected this scale because it "would afford the midwestern lines less revenue than they now receive according to the defendants' [Mountain-Pacific lines'] showing and less than they would receive by use of the cost scales" suggested by those lines. (R. 1039)[90]

[90]-This particular scale differed from the scale actually prescribed by the Commission in only one substantial respect: The factors for the Mountain-Pacific lines were 22 percent higher instead of only 10 percent higher. Appellees' witness denied that this scale was presented as a "proposal" of the Mountain-Pacific lines. The Commission in its initial report stated that the scale was presented as a "suggestion" and not as a "proposal." (R. 1039) However the testimony is characterized, it suggests that appellees' real objection to the prescribed scale is not to the method of its construction but to the fact that it operates to give the Midwestern lines the "moderate increases" in their divisions which the Commission found were justified on the basis of its findings on relative costs.

The Commission's findings explain the reasons for the selection of the scales of prorating factors prescribed and the reasons for rejection of the alternative scales suggested by appellees or discussed in the testimony of witnesses.[91] The findings demonstrate that the Commission determined that the scales prescribed, as compared with other alternatives, were a reasonable mechanism for correcting the unfair discrepancy that existed between the revenues of the Midwestern lines under existing divisions and their cost contribution to the traffic involved and would in fact correct that discrepancy.[92] The Commission's reports, therefore, establish a rational relationship between the scales prescribed and the findings of fact to which they were addressed.

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[91] In addition to the findings that have been discussed above the Commission in its supplemental report made findings specifically directed to the contention of the Mountain-Pacific lines that the Commission should have used a cost scale. The Commission stated that the contention "incorrectly assumes that the *construction* of a divisional scale is primarily a matter of costs and mathematics." (R. 1078; emphasis supplied) The Commission referred to its report in *Official-Southern Divisions*, 289 I.C.C. 4, 6-7 (1953), in which it said "that discretion and flexibility of judgment have attended the use of costs, particularly in determining the contours of divisional scales involving the relation of terminal and line-haul cost elements" and that "due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula." (R. 1079)

[92] Because of the Commission's findings the decisions in *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, and *Burlington Truck Lines* v. *United States*, 371 U.S. 156, cited by appellees (Motion to Affirm, page 15) are inapposite. In those cases this Court held that the Commission had failed to articulate any rational relationship between its findings of fact and its choice of a remedy. In the instant case the Commission made findings that articulate both its reasons for its choice of the scales of prorating factors and its reasons for rejecting other alternatives.

There is implicit in appellees' arguments the assumption that the scales are arbitrary and unreasonable merely because their operation will reduce the revenues of the Mountain-Pacific lines. This assumption does not provide a legitimate ground for criticism of the Commission's choice of the scales. The Commission's determination that the Midwestern lines were entitled to moderate increases in their divisions necessarily meant that any mechanism that the Commission selected to produce those increases would diminish the revenue of the Mountain-Pacific lines. The only question that can properly be raised about the propriety of the Commission's choice of scales of prorating factors is whether the scales arbitrarily reduce the revenues of the Mountain-Pacific lines more than is reasonably appropriate to give the Midwestern lines the moderate increases to which they are entitled.

Appellees' arguments are not even directed to that question. The thrust of their attack on the scales is that the Commission should have used scales constructed from costs. (Motion to Affirm, pages 14-20) As a part of that contention they criticize the construction of the initial mileage blocks in the scales, asserting that those blocks improperly make allowance for what the appellees describe as a "terminal factor," and that this allowance is not supported by adequate findings or by the evidence on terminal costs. (Motion to Affirm, pages 15-17)[93] But appellees make no showing that the scales prescribed by the Commission produce increases in the divisions of the Midwestern lines that are immoderate or excessive in rela-

[93] Appellees never advert to the fact that the divisional factors prescribed for the initial mileage blocks apply to their services as well as to those of the Midwestern carriers. Nor do they advert to the fact that these factors are 10 percent higher for them than they are for the Midwestern carriers. (R. 1039)

tion to the costs as determined by the Commission. Indeed appellees make no showing that the use of properly constructed cost scales would produce divisions more favorable for the Mountain-Pacific lines than the divisions prescribed. The fact is that had the Commission constructed scales of prorating factors on the basis of costs that the Commission found were substantially correct the scales would have produced divisions less favorable to the Mountain-Pacific lines than those prescribed. As we have previously shown, such cost scales would give the Mountain-Pacific lines 57 percent of the revenue for hauls in Mountain-Pacific Territory and the Midwestern lines 43 percent for their hauls in Midwestern Territory, and the scales actually prescribed give the carriers in Mountain-Pacific Territory 58 percent of the revenue and the carriers in Midwestern Territory only 42 percent. (See pages 69-71, *supra*.)

Appellees assert generally that as a result of the initial mileage blocks in the prescribed scales the revenues of the Mountain-Pacific lines will be "substantially diminished" because they "generally have the longer hauls on the traffic at issue."[94] (Motion to Affirm, page 16) The assertion that

[94] Contrary to appellees' assertion, the Commission did not find that the scales which it prescribed could not properly be applied to hauls of more than 1200 miles. (Motion to Affirm, page 17, note 11) In the passage cited by appellees to support this assertion, the Commission rejected the contention of the Midwestern lines that the 29886 scale could be used as a criterion by which to measure mileage inflations and deflations in the divisions prescribed. The Commission pointed out that it had rejected "the unqualified use" of the 29886 scale as a basis for prescribing new divisions. (R. 1085-1086) That rejection is evidenced by the fact that in the scales prescribed the divisional factors for the Mountain-Pacific lines in Mountain-Pacific Territory are 10 percent higher than those in the 29886 scale and accordingly 10 percent higher than those prescribed for the Midwestern lines.

the initial mileage blocks, considered in isolation from the remainder of the scales, will substantially diminish the revenues of the Mountain-Pacific lines is simply not the case. The divisional factors for the Mountain-Pacific lines in the initial blocks are 10 percent higher than those of the Midwestern carriers, and the difference between the average haul in Mountain-Pacific Territory and that in Midwestern Territory is not so substantial as to indicate that the initial blocks could be substantially prejudicial to the Mountain-Pacific lines.[95]

But the significant point is that appellees do not assert that this alleged reduction in the revenue of the Mountain-Pacific lines will be any greater than the reduction that would necessarily result from any mechanism that gave the Midwestern lines the moderate increases that the Commission found were justified. As we have pointed out, if the Commission had constructed divisional scales from properly determined costs, thus eliminating the initial mileage blocks, the resulting divisions would have been less, not more, favorable to the Mountain-Pacific lines. (See pages 70-71, *supra*.) The same result would have been reached if the Commission had used the mileage prorate method of constructing scales, which would have started the scales at zero and thus eliminated the initial mileage blocks to which appellees object.[96] In short, the appellees

[95] The average hauls on Transcontinental traffic are approximately 1,272 miles in Mountain-Pacific Territory and 978 miles in Midwestern Territory. (Exhibit T-632, R. 112, 557, 1032)

[96] Based on the average hauls of 1,272 miles in Mountain-Pacific Territory and 978 miles in Midwestern Territory (Exhibit T-632, R. 112, 557, 1032), a mileage prorate would give the Mountain-Pacific lines 57 percent of the revenue instead of the 58 percent provided by the divisional scales prescribed by the Commission, and would give the Midwestern lines 43 percent of the revenue instead of the 42 percent provided by the prescribed divisional scales.

have made no showing that the prescribed scales of prorating factors inflict any disadvantage on them that is not the reasonable and appropriate result of the Commission's valid determination that the Midwestern lines should be given moderate increases in their divisions.

To support their attacks upon the prescribed scales appellees rely heavily upon the fact that subsequent to the entry of its orders in this case the Commission in a divisions controversy between the lines in Official and Southern Territories prescribed a scale constructed from costs. See *Official-Southern Divisions*, 325 I.C.C. 1 (1965). (Motion to Affirm, pages 15, 19-20) The Commission's order in this later case has no bearing on the sufficiency of the Commission's findings here or on the merits of its choice of the scales of prorating factors. The Commission's order in *Official-Southern Divisions* was directed to a different controversy, a different record and different contentions.[97] The fact that the Commission in one proceeding, on the record there involved, prescribes one mechanism for determining divisions and in a subsequent proceeding, on a different record, prescribes a different mechanism does not establish that its order in the first proceeding is wrong or that there is any inconsistency between its actions in the two instances.[98] This Court has held that an order of the Commission must be judged on its own merits and not by com-

[97] In that case both of the groups of carriers involved requested the Commission to use cost scales in prescribing new divisions.

[98] The appellees' assertion that in the *Official-Southern Divisions* case the Commission "completely repudiated" the divisional scales prescribed here (Motion to Affirm, page 15) is odd in view of the fact that four Commissioners who concurred in the orders here also concurred in the orders in that case without indicating in any way that they were repudiating the orders that they had previously approved.

parison with orders made in other cases, and that the Court has "no concern" with "the alleged inconsistency with findings made in other proceedings." *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 665-666; *Georgia Public Service Commission* v. *United States*, 283 U.S. 765, 775. Indeed, this Court has held that it will not set aside a Commission order merely because the Commission has made different decisions during successive stages of the same controversy. *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Board of Trade* v. *United States*, 314 U.S. 534, 548.[99]

In the course of its history the Commission has used different mechanisms for prescribing divisions. In the past, it has occasionally used the mileage prorate method with the actual miles sometimes increased by a given percentage to make allowance for different transportation conditions in different territories. It has more often used integer scales which are based on, or related to, class rate scales, as it did in the present case, and orders of the Commission using this mechanism for the prescription of divisions have been upheld by this Court. See *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, affirming orders entered in *Divisions of Freight Rates*, 148 I.C.C. 457 (1928), 156 I.C.C. 94 (1929); *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, affirming orders made in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729 (1933), 198 I.C.C. 375 (1934); and *Boston & Maine R. R.* v. *United States*, 208 F. Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26, affirming order entered in *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960). On a few

[99] In *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 359, this Court said of divisions cases:

> "Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases."

occasions the Commission has used divisional scales constructed from costs. But that fact does not justify appellees' contention that the Commission is obliged always to use cost scales as a mechanism for prescribing divisions. The Commission has discretion to use any mechanism that is reasonably designed to provide divisions that will be fair and equitable in the particular circumstances involved. In the instant case the Commission did not exceed or abuse this discretion. It selected scales that were designed to provide and will provide the "moderate increases" in the divisions of the Midwestern lines that the Commission found were justified on the basis of relative costs.[100]

Without facing the fact that the scales in their entirety impose no disadvantage upon them that is not the appropriate result of the Commission's finding that the Midwestern lines should be given moderate increases in their divisions, appellees insist that the Commission's reports are

[100] The fact that the Commission determined that the Midwestern lines were entitled to moderate increases in their divisions on the basis of its findings as to relative costs does not mean that the Commission was legally obligated to prescribe new divisions by using prorating factors constructed from costs. This Court regarded the Commission's order in *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, as resting primarily on considerations of relative cost. See 282 U.S. at 87-88. Yet the Court sustained the Commission in prescribing new divisions by the use of prorating factors related to a class rate scale. 282 U.S. at 80. The Commission was entitled to use any mechanism for prescribing new divisions that was appropriately and reasonably designed to achieve the moderate increases that the Commission had determined the relative costs justified. See *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194, and the other authorities cited at page 89, *supra*. The scales prescribed by the Commission comply with this standard. As we have pointed out, they will produce divisions that are more favorable to the Mountain-Pacific lines than those that they would enjoy under properly constructed cost scales. (See pages 70-71, *supra*)

fatally defective because they do not discuss in detail the construction of the initial mileage blocks of the scales. There is no substance in this contention. The reasons for the construction of the initial mileage blocks are adequately explained by the Commission's findings that it used rate scales as a foundation for constructing the divisional scales prescribed and that it is reasonable thus to divide the rates in accordance with the way they were made. (See pages 90-91, *supra*.)– These findings, read together with the precedents to which they refer, make it clear that the construction of the initial mileage blocks is the result of the fact that the initial mileage blocks in the class rate scales were constructed in a similar way. They also make it clear that the allowance in the initial blocks covers not only terminal costs, but also a stand-by charge for the privilege of the use of the facilities provided.[101]

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[101] The so-called 29886 scale of divisional factors from which the Commission derived the prescribed scales was based on the class rate scale prescribed by the Commission in *Class Rate Investigation, 1939*, 281 I.C.C. 213 (1951). The class rate scale there prescribed provided in the initial mileage block for an allowance of the kind that appellees attack. In its report in that proceeding the Commission made findings that the allowance was designed to cover both costs that have no relation to the length of haul and a stand-by charge for the privilege of the use of the facilities provided. 281 I.C.C. at 236.

The Commission made a similar finding in *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960). In that proceeding the Commission prescribed divisions by use of scale of prorating factors in which the factors for the initial mileage blocks were similar to those prescribed here. (Motion to Affirm, page 15, note 8) The Commission found that the construction of the initial mileage blocks in the scale there prescribed gave "appropriate recognition" to terminal costs and to the "relatively short hauls" of certain of the railroads involved. 309 I.C.C. at 510. The Commission's order in that case was sustained on review. *Boston & Maine R.R. v. United States*, 208 F. Supp. 661 (D. Mass. 1962), affirmed, 371 U.S. 26.

Appellees concede that the record contains evidence with respect to terminal costs. They fail to note that the record also contains evidence with respect to the propriety of making an allowance in the initial mileage blocks for a stand-by charge. (Exhibit MW-439, R. 87, 473-475) The Commission was not required to specify the weight that it gave to each of these elements or to make findings indicating how much of the allowance represents terminal cost and how much a stand-by charge. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359-360; see also *N.L.R.B.* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348.

We submit that appellees' attacks upon the scales prescribed by the Commission raise no substantial issues as to the sufficiency of its findings or as to the propriety of its selection of the scales. The Commission's findings adequately explain both its reasons for selecting the scales and its reasons for rejecting alternative methods of providing for the moderate increases in the divisions of the Midwestern lines that the Commission found were justified. The scales are reasonably related to the facts found and to a proper statutory objective. To the extent that they diminish the revenue of the Mountain-Pacific lines from the traffic in question, that result is both justified and required by the Commission's findings on relative cost of service. In short, the Commission's selection of the scales of prorating factors was a permissible exercise of its discretion that should not be disturbed by this Court.

B. The Findings of the Commission in Support of the Prescription of Minimum Primary Divisions Are Supported by Substantial Evidence

Appellees contend that the Commission's findings in support of its prescription of a minimum primary division of 15 percent are not supported by substantial evidence. (Motion to Affirm, pages 19-20)[102]

The Commission found that the 15 percent minimum primary division was supported (1) by the past practice of carriers in establishing divisional bases by agreement, (2) by the past practice of the Commission in prescribing minimum divisions, and (3) by "increasingly burdensome terminal costs in recent years." (R. 1036-1037)

Each of these findings was supported by substantial evidence. There was uncontradicted testimony that many divisions agreements made by carriers provide a 15 percent minimum, and there was evidence relating to particular divisions agreements which contain a provision of that kind. (Exhibit MW-439, R. 87, 474)[103] There was also

[102] The 15 percent minimum division was prescribed (R. 1099) on traffic from and to points in Group E-5, Southeastern Illinois, which is a part of Official Territory, and was also prescribed (R. 1104) as a minimum primary division for hauls in Midwestern Territory and for hauls in Transcontinental Territory on Midwestern-Transcontinental traffic. Since the 15 percent minimum would have only a limited application on Midwestern-Transcontinental traffic, the practical importance of the prescription is confined, as appellees suggest, to traffic from and to points in Southeastern Illinois. (Motion to Affirm, page 6) Five of the appellants have lines of railroad that serve these points.

[103] One of the division agreements covered by the testimony provided for a 15 percent minimum division of joint rates between points in Official Territory and points in Western Trunk Line Territory and was signed by five of the principal Mountain-Pacific carriers which have lines in the latter territory. (R. 474)

testimony with respect to Commission orders which had prescribed a 15 percent minimum division of interterritorial joint rates.[104] (Exhibit E-487, R. 94, 476-477, 482)

There was substantial evidence that terminal costs have become increasingly burdensome in recent years. A cost study was introduced in evidence which demonstrated that terminal costs on traffic handled in box cars in the Western District had increased from 2.9 cents per hundredweight in 1939 to 6 cents per hundredweight in 1957, an increase of 207 percent, and that, in contrast, line-haul costs on the same traffic had increased in the same period by only 140 percent. The study also showed comparable increases in terminal costs on traffic handled in refrigerator cars in the Western District and on box car and refrigerator car traffic in the Eastern District. (Exhibit E-700, R. 123, 607) In addition, there was testimony that terminal costs tend to increase faster than line-haul expense, which was supported by comparisons of costs in 1947 and 1953. (Exhibit E-487, R. 94, 477-478)

Appellees apparently do not contend that there is no substantial evidence that the terminal costs are burdensome or that those costs have increased in recent years. They

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The witness who testified with respect to these divisions agreements also testified that a minimum primary division has a two-fold purpose: It is designed to compensate a carrier for terminal services and other expenses that have no relation to length of haul and it is also designed to provide a stand-by allowance, *i.e.*, "an allowance to reflect the fact that the carrier provides a line of railroad, equipment, and employees to handle traffic day in and day out." (Exhibit MW-439, R. 87, 474-475)

[104] The Commission's decisions referred to included *Official-Western Trunk Line Divisions*, 269 I.C.C. 765, 786 (1948); *Official-Southern Divisions*, 287 I.C.C. 497, 547 (1953); and *Official-Southwestern Divisions*, 287 I.C.C. 553, 596 (1953).

appear rather to argue that the evidence did not justify the prescription of a minimum division of 15 percent as opposed to some lower percentage. This is an argument that simply quarrels with the Commission's appraisal of the weight of the evidence, with the inferences that the Commission has drawn from the evidence, and with the expert judgment of the Commission on a matter of transportation economics. It provides no support for an argument that the Commission's finding should be set aside. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359; *Board of Trade* v. *United States,* 314 U.S. 534, 546, 548; *New York* v. *United States,* 331 U.S. 284, 328, 335, 349.

V.

THE DISTRICT COURT ERRED IN REMANDING THE CAUSE TO THE COMMISSION FOR FURTHER PROCEEDINGS WITHOUT RETAINING JURISDICTION TO REQUIRE EQUITABLE RESETTLEMENTS OF THE DIVISIONS INVOLVED

For the reasons that we have stated in the preceding sections of this brief, we submit that the District Court erred in setting aside the orders of the Commission and that the judgment of that court should be reversed. If the orders of the Commission under review are upheld, it will not be necessary for appellants to seek any additional relief from this Court because their right to equitable resettlements is protected by the conditions attached to the interlocutory injunctions of the District Court. (See note 25, page 27, and note 66, page 73, *supra.*) On the other hand, if for any reason further proceedings should be required in the District Court that might possibly result in a remand to the Commission, the question would arise whether, under traditional principles of equity, the District Court should retain jurisdiction to require the Mountain-Pacific lines to make a just and equitable resettlement of divisional

revenues with the Midwestern lines after a further decision of the Commission on remand. After the court below rendered its opinion and before it entered its judgment, these appellants sought and were denied this relief. (R. 1736, 1739-1745) Appellants submit that in this respect the court below committed error even if it is assumed *arguendo* that one or more of its grounds for invalidating the orders of the Commission may be valid.

The Commission found that the existing divisions of joint freight rates on Transcontinental traffic between these appellants and the Mountain-Pacific lines were unjust, unreasonable and inequitable. (R. 1040, 1093) This finding was based upon the Commission's subsidiary findings that the revenues accruing to the respective groups of carriers from the existing divisions were not properly related to the costs that each group bore in providing the service. (See pages 15-17, *supra*) In other words, the Mountain-Pacific lines received more revenues and the Midwestern lines less revenues than their respective contributions to the service entitled them to receive.

The court below did not set aside the Commission's orders on the ground that there was any infirmity in its findings on the unlawfulness of the existing divisions. Instead, the court below rested its decision on the ground that the Commission had failed to make certain findings that were held to be necessary to support its prescription of lawful divisions in substitution for the divisions found to be unlawful. (R. 1714-1734) Thus there has been no judicial determination that the Commission erred in finding that the existing divisions of rates unduly favor the Mountain-Pacific lines and that other and more equitable divisions should be prescribed. And even if it is assumed *arguendo* that the decision below is addressed to the Commission's findings on the illegality of the present divisions as well

as to its findings made in support of its prescription of new divisions, that decision, relating as it does simply to particular findings that the Commission made or neglected to make, would not affect the Commission's authority and obligation to make adequate findings on remand that would support an order prescribing lawful divisions.

The Commission's order was that the carriers should begin to divide the revenues from the joint Transcontinental rates on the basis it prescribed as equitable effective July 1, 1963. (R. 1052) Beginning at least then, the Mountain-Pacific lines in equity began incurring an obligation to the Midwestern lines in the amount of the differences between the present excessive divisions that, because of judicial intervention, the Mountain-Pacific lines were able to go on collecting and just, reasonable and equitable divisions.

The Mountain-Pacific lines were enabled to continue to collect unjust shares of the revenues from the Transcontinental rates by the preliminary injunctions against enforcement of the Commission's orders entered by the court below upon their application. Those preliminary injunctions are still in effect, because the final judgment of the court below, setting aside the Commission's orders, was stayed. (R. 1759) The preliminary injunctions contain a condition under which the Mountain-Pacific lines are required to reimburse the Midwestern lines, with interest, for the revenues that the Midwestern lines should have been collecting but, because of the preliminary injunctions, have not been collecting in the period since the Commission's initial order was to become effective; however, this condition comes into play only if the orders of the Commission are finally sustained in the proceeding that is the subject of this appeal. (R. 1196-1200, 1259-1264)

The power of the Commission to require a retroactive adjustment of the divisions of a joint rate is limited by Section 15(6) of the Interstate Commerce Act to cases in which the joint rate was established pursuant to a Commission finding or order. The Transcontinental rates were not so established.[105] Thus, the refusal of the lower court to retain jurisdiction for the purpose of requiring equitable resettlements leaves the parties in a position where a Commission determination that existing divisions of freight rates are unlawful may be effectively frustrated for a long period by judicial proceedings in which the basic correctness of that determination is not questioned by the reviewing court. All that has been decided by the court below is that the Commission failed to make adequate findings in support of its prescription of lawful divisions. This is the judgment that this Court is being asked by appellees to affirm. That judgment provides no basis for any assumption that upon remand the Commission could not prescribe lawful divisions supported by findings that would satisfy the standards applied on judicial review.

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[105] Some of the Transcontinental rates, when first published, were Commission-prescribed rates; but these rates were later increased by the carriers under permissive authority granted by the Commission in general rate-increase proceedings. See, *e.g.*, *Increased Freight Rates, Eastern and Western Territories*, 299 I.C.C. 429 (1956); *Increased Freight Rates, 1960*, 311 I.C.C. 373 (1960). Under the decision in *Brimstone R. Co.* v. *United States*, 276 U.S. 104, 121-123, the increased rates were carrier-made rates within the meaning of the retroactive provision of Section 15(6) of the Interstate Commerce Act, and the Commission was without power to require a retroactive adjustment of the divisions of such rates.

As we have previously pointed out (note 66, page 73, *supra*), the Commission did require the Mountain-Pacific lines to set up reserves in the amount of the differences between the revenues under the existing divisions and the revenues under the prescribed divisions.

In these circumstances, the lower court—which had all involved Mountain-Pacific lines before it—should have retained jurisdiction in order to require resettlements upon a final determination by the Commission of just, reasonable and equitable divisions. Four years have passed since the Commission determined that the present divisions are unjust, unreasonable and inequitable as to these appellants. In those four years Transcontinental freight traffic has continued to move, and these appellants have received for their part of the through service substantially less revenue than the Commission has found that their efforts justify. They would go on receiving less than justice requires in the additional time that would elapse if the cause should be remanded to the Commission for further proceedings.

For the reasons stated earlier in this brief, we submit that the findings made by the Commission in support of its prescription of new divisions are valid and should be affirmed. But if it is assumed *arguendo* that we are wrong on this point, we submit that the guiding principle for decision was stated by Mr. Justice Cardozo for the Court many years ago when he said that a reviewing court is not bound "to make the carrier pay the price of the blunders of the commerce board in drawing up its findings." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 314. In that case it was held that a three-judge district court could give retroactive effect to an order of the Interstate Commerce Commission prescribing increased intrastate freight rates to remove unjust discrimination against interstate commerce. This order prescribed the same rates as an earlier order of the Commission that had been set aside because of insufficient findings. The Court held that an affected carrier should be permitted to retain what it had collected under

rates established pursuant to the first order before it was set aside. The Court noted that Section 13(4) of the Interstate Commerce Act forbade and declared unlawful unjust discrimination against interstate commerce. The unjust discrimination, the Court said, "does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken." 295 U.S. at 312.

Similarly here, Section 1(4) of the Act lays upon every railroad party to a joint rate the duty of establishing "just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice" any participating carrier. The duty is enforced by the Commission under Section 15(6), and a Commission determination that the duty has been breached and will be breached in the future unless existing divisions are supplanted may be given effect by a court of equity even though technical defects are found in the order embodying the determination. Equities arise from the determination; and in *Atlantic Coast Line* the Court observed that "the equities of the carrier, if they are not protected by the court, will be unprotected altogether," and that the situation presented "a summons to a court of equity to mould its plastic remedies in adaptation to the instant need." 295 U.S. at 316.

In *Atlantic Coast Line* the question was the entitlement of a carrier to retain what it had collected under an order first invalidated for technical defects and then restated by the agency and sustained on the restatement. The principle laid down in the case has been applied more broadly by this Court. In *United States* v. *Morgan*, 307 U.S. 183, lower rates were prescribed by an agency. Its order was held procedurally defective and set aside on that ground. Meanwhile, amounts representing the difference between the old

rates ruled unlawful by the agency and the new rates it prescribed had been impounded by the reviewing court. The matter had gone back to the agency to conduct a reopened proceeding that could not result in any enforceable order concerning past rates. The companies subject to the previous, invalidated rate order and to the court's impounding order petitioned the three-judge district court to distribute the impounded funds to them. This Court reversed a judgment granting them the relief they sought.

The Court in *Morgan* observed that the rates condemned in *Atlantic Coast Line* and in the case before it did not cease to be unlawful "merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate," and a court of equity "could take into account the subsequent determination of the administrative agency as the basis of its action." 307 U.S. at 196. In directing the lower court to retain jurisdiction over the impounded funds until the agency had entered a new order, the Court said that such action was required by due regard for the lower court's responsibility to the parties and the public, and by its duty to exercise its equitable discretion in a way that would effectuate the policy of the regulatory statute, which was similar in its terms and purport to the Interstate Commerce Act. 307 U.S. at 198. After the agency entered an order finding the subject rates unlawful and prescribing lawful rates that was sustained on judicial review, this Court held that order furnished the appropriate basis for distribution of the funds in the registry of the lower court. *United States* v. *Morgan*, 313 U.S. 409, 421.

In *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, the principles we have described were applied to a situation where there was no judicial custody of a fund (and, incidentally, where the defects in the involved administrative regulations were substantive). This Court ruled that the case should be held by the district court until the agency whose regulations were held invalid for substantive defects had made valid regulations within the authority conferred by Congress. The fact that *Morgan* involved a fund in court was declared "irrelevant . . . to the governing principles of that decision." 322 U.S. at 620-621.

In the present case, as in *Morgan*, there could be no doubt as to the Commission's authority to make any additional findings that might be required and to enter an order reaffirming its original determination that the existing divisions have been and are unlawful and that new divisions should be prescribed that give these appellants a fair share of the revenues from the traffic involved. The Interstate Commerce Act requires that divisions of joint rail freight rates be just, reasonable and equitable at all times; and it was clear from findings of the Commission which the court below did not question, concerning relative cost of service, that the Mountain-Pacific lines had been receiving excessive divisions, and that a debt in some amount was owing, and would continue to accrue, from them to these appellants: In these circumstances, and quite apart from its rulings on other questions, the lower court plainly erred in remanding the cause to the Commission for further proceedings without reserving jurisdiction to require such resettlements of revenues as might be just and equitable.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Section 1(4) of the Interstate Commerce Act (49 U.S.C. 1(4)) provides in pertinent part:

> It shall be the duty of every such common carrier establishing through routes . . . in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their

respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

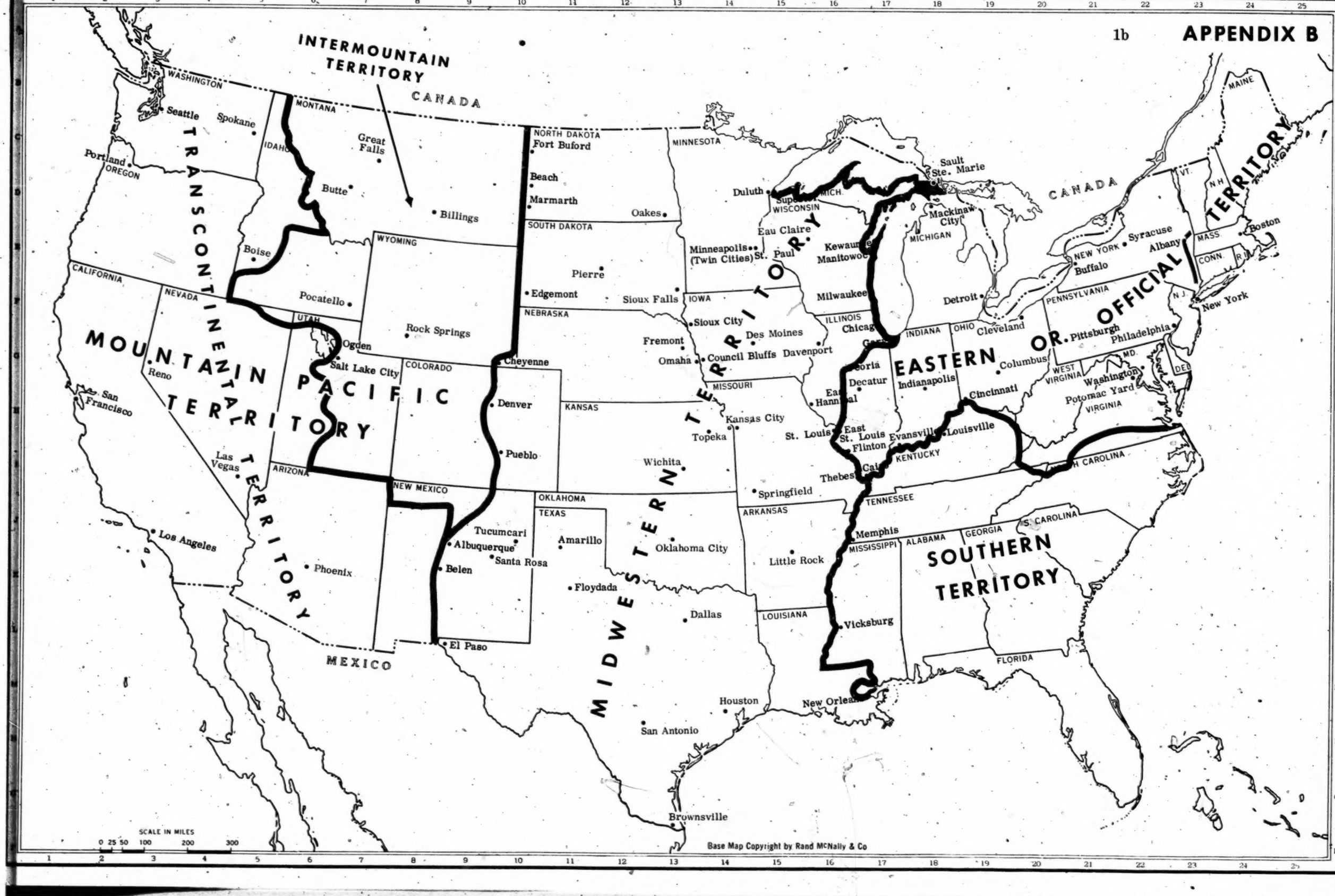
Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007 (b)) provides in pertinent part:

> All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)) provides:

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency

hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.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APPENDIX C

Examples of Application of Prescribed Divisional Scales as Between Midwestern and Mountain-Pacific Lines

In Appendix C-1 of the Commission's supplemental report three divisional scales* were prescribed for determining divisions as between Midwestern and Mountain-Pacific lines: the Column 1 scale for hauls in Midwestern Territory involving origin or destination terminal service;** the Column 2 scale (which is lower than the Column 1 scale) for intermediate service in Midwestern Territory;*** and the Column 3 scale (which is 10 percent higher than the Column 1 scale) for hauls in Mountain-Pacific Territory involving origin or destination terminal service. (R. 1101-1105)

Midwestern-Transcontinental Traffic

The divisions prescribed for Midwestern-Transcontinental traffic may be illustrated by the joint through rate on a shipment from Chicago to San Francisco via the Chicago and North Western to Council Bluffs, Iowa; thence via the Union Pacific from Council Bluffs through Cheyenne, Wyoming (Mountain-Pacific border)to Ogden, Utah; and thence via the Southern Pacific to San Francisco. The rate is first cut in two parts over Cheyenne by use of the Column

* These scales are the same as the ones prescribed in Appendix C of the initial report of the Commission. (R. 1047)

** The Column 1 scale has been in effect since 1953 on traffic between Official and Southwestern Territories, for hauls involving origin or destination terminal service, pursuant to the orders of the Commission in *Official-Southwestern Divisions*, 287 I.C.C. 553, 595-596 (1953), 289 I.C.C. 11, 16 (1953).

*** The Column 2 scale has been in effect since 1953 for intermediate service on Official-Southwestern traffic under the order of the Commission in *Official-Southwestern Divisions*, 287 I.C.C. 553, 595-596 (1953).

1 scale for the Chicago-Cheyenne haul (970 miles, factor 294) and the Column 3 scale for the Cheyenne-San Francisco haul (1,260 miles, factor 404). (R. 1101-1102) The factors are added together and the percentage relationship of each to the total is then determined. In the present example the divisional factors produce primary divisions of 42 percent of the rate for Midwestern Territory and 58 percent of the rate for Mountain-Pacific Territory. The Midwestern primary division of 42 percent is then divided over Council Bluffs (the point of interchange between the Chicago and North Western and the Union Pacific) by use of the Column 1 scale for the Chicago-Council Bluffs haul (473 miles, factor 174) and the Column 2 scale for the Council Bluffs-Cheyenne haul (510 miles, factor 160). (R. 1101) The total of these factors is 334, of which the Chicago and North Western's factor of 174 is 52 percent; and 52 percent of the Midwestern primary division of 42 percent is 22 percent, which is the part of the revenue from the joint rate that is received by the Chicago and North Western for its service from Chicago to Council Bluffs. The remaining 78 percent of the rate (58 percent in Mountain-Pacific Territory and 20 percent in Midwestern Territory) covers the combined services of the Union Pacific and Southern Pacific from Council Bluffs to San Francisco.

The Commission did not prescribe divisions as between the Mountain-Pacific lines.* Hence it did not make provision for subdividing the 78 percent of the rate covering the combined services of the Union Pacific and Southern Pacific from Council Bluffs to San Francisco even though a part of that service (Council Bluffs to Cheyenne) is performed in Midwestern Territory.

* On Midwestern-Transcontinental traffic the Commission prescribed a method of subdividing the proportions covering service in Midwestern Territory on shipments interchanged in that territory between complainant Midwestern lines and defendants named in their complaints. (R. 1103, par. (c))

Official-Transcontinental Traffic

The method of subdividing the Western primary divisions on Official-Transcontinental traffic may be illustrated by the joint through rate on a shipment from New York to San Francisco moving via the route of the foregoing shipment west of Chicago. The differences between the two examples are: (1) in the first, the divisional scales are used to divide the *entire* rate, whereas in the second, the divisional scales are used to divide that *part* of the rate (Western primary division) which *represents* the services of Midwestern and Mountain-Pacific lines; and (2) in the second, the Column 2 scale is used in the computations for *all* hauls in Midwestern Territory because no origin or destination terminal service is performed in that territory on Official-Transcontinental traffic.

The Western primary division of the rate from New York to San Francisco (66 percent) prescribed for service from Chicago to San Francisco (R. 1097) is first divided over Cheyenne by use of the Column 2 scale for the Chicago-Cheyenne haul (970 miles, factor 268) and the Column 3 scale for the Cheyenne-San Francisco haul (1,260 miles, factor 404). (R. 1101-1102) This produces 40 percent of the Western primary division for service in Midwestern Territory and 60 percent of the Western primary division for service in Mountain-Pacific Territory. The Midwestern proportion of 40 percent is then divided over Council Bluffs by use of the Column 2 scale for the Chicago-Council Bluffs haul (473 miles, factor 148) and the Column 2 scale also for the Council Bluffs-Cheyenne haul (510 miles, factor 160). (R. 1101) This calculation allocates 48 percent of the 40 percent, or 19 percent of the Western primary division, to the service of the Chicago and North Western from Chicago to Council Bluffs. The remaining 81 percent of the Western

primary division covers the combined services of the Union Pacific and Southern Pacific from Council Bluffs to San Francisco. As in the case of the first example, no divisions were prescribed as between the Union Pacific and the Southern Pacific.*

If the percentages (19 and 81) of the Western primary division produced by the prescribed divisional scales are converted into percentages of the through rate from New York to San Francisco, the resulting divisions are 13 percent of the rate for the service of the Chicago and North Western from Chicago to Council Bluffs and 53 percent of the rate for the combined services of the Union Pacific and Southern Pacific from Council Bluffs to San Francisco.

* On Official-Transcontinental traffic the Commission prescribed a method of subdividing the proportions of the Western primary divisions representing hauls across Midwestern Territory on shipments interchanged in that territory between complainant Midwestern lines and defendants named in their complaints. (R. 1103-1104, par. (d) last sentence)

APPENDIX D

Increase to Midwestern Railroad Appellants and Decrease to Mountain-Pacific Lines from Prescribed Divisions

Pursuant to Commission Accounting Circular No. 134, issued on November 27, 1963, and supplements thereto, the eight Midwestern railroad appellants reported to the Commission that they would receive $11,638,000 of additional revenues in 1965 if the Commission's orders are upheld.

The reports filed with the Commission do not disclose the total amount of revenue received by the eight Midwestern appellants in 1965 under the present divisions from the traffic in issue. It is possible, however, from the record before the Commission to make an estimate of the amount of that revenue. Such an estimate indicates that, as of 1953, the annual revenue of the eight Midwestern appellants under the present divisions from the traffic in issue was approximately $110,208,000. The derivation of this estimate is shown below.* It is believed reasonable to assume that there has been no substantial change in the revenue of those appellants from the traffic in question between the end of 1953 and 1965.

The Commission prescribed divisions would thus increase revenues of appellants by about 11 percent ($11,638,000 ÷

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* The total revenues of the appellants from the present divisions on carload traffic are shown at R. 984 and 987, as $110,208,000 as of 1953. This total is somewhat understated because it does not include the Soo Line Railroad, which is not separately shown at R. 984 and 987, and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company revenues are incomplete. (See R. 985, 1057-1058) Since the Minneapolis & St. Louis Railway Company is now part of the Chicago and North Western Railway, its revenues are included in the total.

$110,208,000).* Since the Mountain-Pacific roads' revenues from this traffic are over three times the Midwestern roads' revenues (see Tables at R. 984 and 987), the corresponding decrease in the revenues of the Mountain-Pacific roads is less than 4 percent.

* The corresponding reductions in the revenues of the Mountain-Pacific lines under prescribed divisions cannot be obtained directly from the reports of those carriers to the Commission under its accounting instructions because those reports do not show reductions on account of increases to the Midwestern lines separately from reductions due to increases to the Eastern lines.